IN THE

Supreme Court of the United States

DECEMBER TERM, A. D. 1899.

The Farmers' Loan and Trust Company, *Plaintiff in Error,*

vs.

The Lake Street Elevated Railroad Company, The American Trust and Savings Bank, and The Northern Trust Company, *Defendants in Error.*

Writ of Error to the Supreme Court of Illinois.

Brief and Argument for The American Trust and Savings Bank, Trustee, Defendant in Error.

MAY IT PLEASE THE COURT:

The position of this defendant in error has been defined in its brief heretofore submitted to this Court upon the motion for dismissal of the appeal herein. This brief is merely an answer to the contentions advanced by the plaintiff in error, in reply to the points made upon the motion to dismiss or affirm. It has not been deemed proper to reargue those points at length, but for convenience of reference copies of the brief on the motion to dismiss or affirm are bound up herewith.

This Court has, in *New York* v. *Roberts*, 171 U. S., 658, and in a long line of similar cases, held that only

the Federal questions appearing of record, are before this Court for its consideration upon a writ of error to the Supreme Court of a state. It is not deemed necessary, therefore, to refer to the facts, or law, or to discuss the merits upon the question of the removal of the plaintiff in error as trustee, which matters counsel for plaintiff in error consider on pages 16 to 18 of their brief.

The sole questions open for consideration are, first, whether the State Court erred in denying the motion of the plaintiff in error for a removal of this case to the Circuit Court of the United States, *i. e.*, whether the State Court had any jurisdiction to proceed to final decree; and second, whether the decree rendered in the State Court by which the plaintiff in error is enjoined from prosecuting any actions for foreclosure deprives the plaintiff in error, erroneously, of some right under the Constitution and laws of the United States.

As already stated in the brief of this defendant in error on the motion to dismiss, it does not join with any party to the record herein in urging any contention upon the merits upon this Court. It simply represents its own interests as trustee, and the interests of all of the bondholders. The facts, and the construction of the state statute have been determined by the courts of Illinois herein, and inasmuch as those courts are deemed by this defendant in error to have had jurisdiction it is with great anxiety that the status of the trust estate in its charge may be speedily determined, that it submits that there is no ground shown for disturbing the conclusions reached by the Supreme Court of Illinois, and that the whole controversy should not be reopened by its removal to the Circuit Court of the United States for trial *de novo*.

BRIEF OF POINTS.

I.

THE SUPERIOR COURT OF ILLINOIS HAD JURISDICTION TO PASS UPON THE SUFFICIENCY OF THE REMOVAL BOND, AND DID NOT ERR IN REJECTING IT.

A state court has jurisdiction to determine the sufficiency of the removal bond, and to reject it if it is insufficient.

Removal cases, 100 U. S., 457.

The provisions of the Removal Act, as to a bond, are essential if insisted on in the state court.

Ayers v. *Watson*, 113 U. S., 594, 598.

Insufficiency of the bond defeats removal.

Shedd v. *Fuller*, 36 Fed. Rep., 609.

Combs v. *Nelson*, 91 Ind., 123, 126.

Bates v. *B. & O. R. R. Co.*, 39 Oh. St., 157.

C. C. C. & St. L. R. R. Co. v. *Monaghan*, 140 Ill., 474.

Austin v. *Gagan*, 39 Fed. Rep., 626.

The bond in this case was insufficient, because it is not the bond of the petitioner.

C. C. C. & St. L. Ry. v. *Monaghan*, 140 Ill., 471.

Hayes v. *Todd*, 34 Fla., 234.

Hunter v. *Colquit*, 73 Ga., 44.

People's Bank v. *Aetna Ins. Co.*, 53 Fed. Rep., 161.

Because the bond was not shown to be good and sufficient.

C. C. C. & St. L. Ry. Co. Monaghan, 140 Ill., 474-484.

Darst v. *Bates*, 51 Ill., 440.

II.

THE BILL AND PETITION DO NOT DISCLOSE A REMOVABLE CASE.

Proper parties defeat original jurisdiction unless dismissed, and their presence prevents removal.

Wetherby v. *Stinson*, 18 U. S. App., 714.

Wilson v. *Oswego Township*, 151 U. S., 56.

Authorities cited pages 29 *et seq.* brief of this defendant in error on motion to dismiss.

A case in which there is but a single centroversy cannot be removed, unless the parties to it are such that it could have been originally commenced in the Circuit Court.

Blake v. *McKim*, 103 U. S., 336.

Hanrick v. *Hanrick*, 153 U. S., 192.

Brief of this defendant in error on motion to dismiss, pp. 30 *et seq.*

The presence of the Northern Trust Company as a bond-holder, and of this defendant in error as trustee, as defendants, defeated removal.

(Brief of this defendant in error on motion to dismiss, pp. 22 *et seq.*)

They are necessarily defendants, their interests *prima facie* being adverse, and their rights and position as to the appointment of a new trustee by the court being clearly adverse to the prayer of the bill to that effect. The co-trustee is a necessary party, as are also the *cestuis qui trustent* to the bill seeking the removal of a trustee.

Lawrence v. *Lawrence*, 181 Ill., 248–252.

Butler v. *Butler*, 164 Ill., 171–177.

(Brief of this defendant in error on motion to dismiss. pp. 22, *et seq.*)

The question of removal must be determined on the record when the petition was filed.

Graves v. *Corbin*, 132 U. S., 571, 585.

Merchants Cotton Press Co. v. *N. A. Ins. Co.*, 151 U. S., 368-384 (and cases cited in brief of this defendant in error on motion to dismiss, pp. 16 *et seq.*).

This defendant was a necessary party.

(Brief on motion to dismiss, pp. 22 *et seq.*)

It represented the bondholders who were not parties.

Farmers' Loan & Trust Co. v. *El. R. R. Co.*, 173 Ill., at p. 457.

IV.

THERE IS NO FEDERAL QUESTION HERE INVOLVED ASIDE FROM THAT AS TO REMOVAL.

Brief of this defendant on motion to dismiss, pp. 36 *et seq.*

A question as to which there is no doubt under the decisions of this Court, is no longer a Federal question.

Black's Dillon on Removal of Causes, § 109, and cases cited.

The state court did not err in enjoining plaintiff in error from further prosecuting the foreclosure proceeding in the Circuit Court, after its removal as trustee.

Moran v. *Sturges*, 154 U. S., 256, 270.

ARGUMENT.

The removal of this case was defeated because the removal bond was adjudged insufficient by the state courts, and because it was held by those courts that there was not a removable cause presented by the bill of complaint, and the petition for removal. As counsel for the plaintiff in error remark, the opinions of the Supreme and Appellate Courts of Illinois dwell only upon the insufficiency of the bond for removal (173 Ill., 439; 66 Ill. App., 666). The Superior Court of Illinois denied the petition for removal, however, not only on that ground, but upon the further ground that the case presented by the bill was not removable. (Opinion of Superior Court, Pr. Rec., pp. 536-538.) The several grounds upon which the removal of the case sought by plaintiff in error was improper and unwarranted have been fully presented in the brief already filed in behalf of this defendant in error, and there remain for consideration only such matters as counsel for plaintiff in error submit in support of their opposing contentions.

I.

THE SUPERIOR COURT HAD JURISDICTION TO PASS UPON THE SUFFICIENCY OF THE BOND, AND DID NOT ERR IN REJECTING IT.

Counsel for plaintiff in error apparently misconstrue the powers of the Superior Court to deny as it did the sufficiency of the bond presented for removal.

That the Superior Court (the state court) had jurisdiction to pass upon the sufficiency of the bond is recognized by this court in *Removal Cases*, 100 U. S., 456–457.

And in *Ayers* v. *Watson*, 113 U. S., 594, 598, cited by counsel for plaintiff in error upon this point, this Court says of the proceedings in the state court:

"Application in due time, and the proffer of a proper "bond as required in the third section, *are also essential* "*if insisted on*, but, according to the ordinary principles "which govern such cases, may be waived, either expressly or by implication."

And referring to the third section of the act of 1875 this Court also says:

"The directions of the third, *though obligatory*, may "to a certain extent be waived."

Insufficiency of the bond, either as to form or sureties, is good ground for denial by the state court of the petition for removal.

Shedd v. *Fuller*, 36 Fed. Rep., 609.

Combs v. *Nelson*, 91 Ind., 123, 126.

New Orleans & Ft. J. & G. I. R. Co. v. *Rabasse*, 10 So. Rep., 708; S. C., 44 La., Ann., 178.

Hayes v. *Todd*, 15 So. Rep., 752; S. C., 34 Fla., 233.

Bates v. *B. & O. R. R. Co.*, 39 Oh. St., 157.

McWhinney v. *Brinker*, 64 Ind., 360.

Darst v. *Bates*, 51 Ill., 440.

C. C. C. & St. L. R. R. Co. v. *Monaghan*, 140 Ill., 474.

The two *nisi prius* Federal opinions—*Stevens* v. *Richardson*, 20 Blatch., 53, and *People's Grain & Stock Ex.* v. *Tel. Co.*, 11 Biss., 568, cited by counsel for plaintiff in error on the sufficiency of the bond, were both rendered on motions to remand, where the condition of the defective bond had already been performed and where no objection had been made thereto in the state court.

These cases must be read with the fact in mind that, although *after* a case has been removed, and *after* the condition of the bond has been performed to the extent of the filing of the record in the Circuit Court, there may be a discretion in that Court to allow an amendment of the bond or to hold that a defect in the bond has been waived, yet *before* the removal is had it is in the discretion at least, if it is not the duty of the State Court, to insist upon a proper and sufficient bond.

The bond in this case was bad for two reasons:

FIRST. *It is not made by the petitioner for removal.*

The bond filed is as follows:

"Know all men by these presents, that we, William "Burry and Rockwell King, of Chicago, in the County "of Cook, and State of Illinois, are held and firmly "bound unto the Lake Street Elevated Railroad Com- "pany in the penal sum of $500," etc. (Pr. Rec., 33.)

(The condition of the bond is not objectionable.)

This bond is not the bond of the petitioner, and is insufficient for that reason.

C. C. C. & St. L. Ry. v. *Monaghan*, 140 Ill., 471.

Weed Sewing Machine Co. v. *Smith*, 71 Ill., 204.

Farmers' L. & T. Co. v. *Lake St. El. R. Co.*, 173 Ill., 439. (This case.)

Hayes v. *Todd*, 34 Fla., 234.

Hunter v. *Colquit*, 73 Ga., 44.

In *Shedd* v. *Fuller*, 36 Fed. Rep., 609, GRESHAM, C. J., says:

"While it is clear that the right of removal does not "depend upon the action or non-action of the state court, "it is equally clear that the state court cannot be de- "prived of its right *to decide for itself* upon the *sufficiency* "of the petition *and bond*. The presentation of a proper "petition *and bond* to the state court for its action is a "jurisdictional prerequisite."

In *Austin* v. *Gagan*, 39 Fed. Rep., 626, SAWYER, C. J., says:

"That the bond was necessary to effect a removal "seems clear. * * * The filing of a bond is re- "quired by the same language as the filing of a petition, "and it must receive the same construction with refer- "ence to the bond as with reference to the petition."

In *People's Bank* v. *Aetna Ins. Co.*, 53 Fed. Rep., 161, cited by counsel for plaintiff in error as "directly in point" (Brief, p. 58), the Court says:

"An objection was raised at the hearing to the bond. "It is not signed by the defendant, but *it is executed* "*by two responsible persons*. The act of Congress "says that the party desiring removal must, with his "petition, to this end make and file therewith a bond "with good and sufficient surety for his or their enter- "ing into the Circuit Court, on the first day of its then

"next session, a copy of the record, etc. *Strictissimi* "*juris*, if a party make a bond, it should be his bond."

Though so ruling, the Court held that, as the removal had been effected, and no objection appeared to have been made in the state court, there was no substantial failure to comply with the statute.

But it is evident from this case, as from those in the Supreme Court of Illinois and elsewhere, cited *supra*, that the Superior Court had full power to insist upon a bond according to the letter of the removal act, and that the bond here tendered was not such a bond.

Second, the record does not show that the bond tendered to the Superior Court was good and sufficient.

The first two objections filed to the petition for removal by this defendant in error were as follows:

"That said petitioner has not filed a good and sufficient "bond, as provided in and by the statutes of the United "States." * * * (Pr. Rec., 35.)

"2. That the said bond filed herein is insufficient in "form and substance." (Pr. Rec., 35.)

In *C. C. C. & St. L. Ry. Co.* v. *Monaghan*, 140 Ill., 474, 484, the Court says:

"The plaintiff below filed written objections to the re- "moval, the first of which was that the bond was not "good and sufficient. * * * Upon hearing and "argument the court held the objections to be good, and "we think that its ruling was correct upon the authority "of the case of *Weed Sewing Machine Co.* v. *Smith*, 71 "Ill., 204. After the hearing and argument upon the "written objections one of the defendant's attorneys, "Mr. McNulty, who signed the bond as surety, asked "leave to file an affidavit as to his responsibility. Leave "was refused; but the affidavit is in the record *and was* "*insufficient if it had been received.* It simply sets forth "that he is *worth* the sum of $2,000 over and above all "his exemptions of every kind and over and above all

"his liabilities. *It does not state that he has any prop-*
"*erty subject to execution in the district or state, or that*
"*he is a resident of the state.*"

The only proof of the solvency and sufficiency of the sureties on the bond *in the record* in this case is the following affidavit:

"Rockwell King, being duly sworn, on oath says that "he signed the foregoing bond, and that he is *worth* "more than the sum of ten thousand dollars ($10,000) in "unincumbered real estate in the City of Chicago, over "and above all his debts and liabilities.

"ROCKWELL KING.

"Subscribed and sworn to before me this 31st day of "January, A. D. 1896.

"EMERY D. FRAZER,
[SEAL] "*Notary Public.*"

This affidavit is clearly insufficient under the ruling in *C. C. C. & St. L. Ry. Co.* v. *Monaghan*, *supra*.

In *Darst* v. *Bates*, 51 Ill., 440, the Court says:

"Again, in this case we fail to find there "was any justification of the sureties offered "on the bonds which were offered in the court "below on the application for the removal. "The court below was not required to take judicial "notice of the sufficiency of the sureties as to *solvency*, "responsibility, *residence*, etc. But if it was the duty of "the court, *we would presume that in the exercise of that* "*duty he knew the primary condition of the bail and re-*"*garded them as insufficient.*"

This presumption sustains the denial in this case of the application for removal, as there is no evidence competent to show the sufficiency of the sureties in the record.

Although counsel for plaintiff in error appear from *the opinion* of the Superior Court to have made some effort to cure the bond by oral evidence, they did not preserve this evidence as the Court gave them leave to do, by a certificate of evidence. (Pr. Rec., 36.)

And on the record as it stands the bond is insufficient, for the residence and financial responsibility of the sureties do not appear *of record.*

II.

THE BILL AND PETITION FOR REMOVAL DO NOT DISCLOSE A REMOVABLE CASE.

This is the only point discussed in the brief of this defendant in error on the motion to dismiss or affirm.

That brief it is desired to supplement at this time only by the consideration of the reply made to it in the briefs of the defendant in error.

What parties defeat removal by reason of their joinder?

Counsel for plaintiff in error cite, beginning on page 62 of their brief, a number of cases to support the contention that only where citizens of the same state on different sides of a controversy are *indispensable* parties is Federal jurisdiction defeated.

But those cases merely go to the effect that there may be Federal jurisdiction of the *subject-matter* of a controversy if the opposing parties to it, who are indispensable to its determination, are citizens of different states

In all of them this rule, which finds expression in the 47th Equity Rule, merely permits the determination of a controversy without the presence of proper parties, and the decree entered in their absence is made without prejudice to their rights.

But this rule does not permit the Federal Courts to retain jurisdiction of such a controversy, if proper parties are *joined* as defendants, whose citizenship does not show

the required diversity. If joined originally, they must be dismissed to save the jurisdiction of the Court.

That is what was done in *Horn* v. *Lockhard*, 17 Wall., 570, cited by counsel for plaintiff in error.

That is what it is held, uniformly, must be done, as in *Wetherby* v. *Stinson*, 18 U. S. App., 714—s. c., 62 Fed. Rep., 173; *Hicklen* v. *Marco*, (U. S. App.), —56 Fed. Rep., 549; *Pittsburg, C. & St. L. Ry. Co.* v. *B. & O. R. Co.*, 22 U. S. App., 359—61 Fed. Rep., 705; *Wilson* v. *Oswego Township*, 151 U. S., 56, and other cases cited on pp. 29 *et seq.* of the brief of this defendant in error on the motion to dismiss.

And the same rule is applicable in determining jurisdiction upon removal.

Where, as in this case, there is only a single controversy presented by the bill, the presence of one who is merely a proper party defeats Federal jurisdiction. And if there are separable controversies, the presence of proper parties to the determination of the particular controversy which it is sought to make the basis of removal, will prevent removal if their citizenship is such that there is not the requisite diversity, when they are considered.

The cases of *Barney* v. *Latham*, 103 U. S., 205; *Blake* v. *McKim*, 103 U. S., 336; *Mitchell* v. *Smale*, 140 U. S., 40 ', and *McHenry* v. *R. R. Co.*, 25 Fed. Rep., 67, cited by counsel, are upon the act of 1875.

They do not, however, go to the extent of the contention of counsel. In *Barney* v. *Latham* this Court was discussing the question of the joinder of merly *formal* parties, whose interest was so remote in the removable controversy that it was contended that the bill was multifarious as to them!

And in *Blake* v. *McKim*, 103 U. S., 336, *supra*, this Court says:

"The present case is, therefore, one in which the suit "embraces only one indivisible controversy. It is not "*wholly* between citizens of different states, and fully "determinable as between them, because some of the de- "fendants are citizens of the same state with the plaint- "iffs."

So in the present case, there being only one controversy, the cause could not be removed unless it could be originally commenced and maintained in the Circuit Court.

In *Wilson* v. *Oswego Township Co.*, 151 U. S., 56, the distinction here contended for between *proper* and merely formal parties was made by this Court, as applicable even under the act of 1875.

In *Hanrick* v. *Hanrick*, 153 U. S., 192, this Court again applies the rule that, where there is but one controversy in a case, it cannot be removed by one of the several defendants, citing and following *Blake* v. *McKim*, *supra*. And this Court strongly intimates in that case, that the same rule applies to the act of 1887–1888.

In *Const. Co.* v. *Cane Creek*, 155 U. S., 283, mere formal parties were considered.

N. Y. Const. Co. v. *Simons*, 53 Fed. Rep., 1, considers a stakeholder as a merely formal party, contrary to *Wilson* v. *Oswego T. Co.*, 151 U. S., 56, and without considering the effect of the act of 1887-8 holds that, being such, he would not defeat removal of a clearly severable controversy, *which was distinct from any relief sought against him.*

So also in *State of Missouri* v. *Alt*, 73 Fed. Rep., 302, and *Carver* v. *Trust Co.*, 73 Fed. Rep., 9, merely

formal parties were considered, whose presence would not defeat *original* jurisdiction, and so would not defeat removal.

The contention here made is, that where there is such joinder of parties that a cause could not be entertained if originally brought in the Circuit Court, it cannot be removed from a state court thereto.

(Brief of this defendant in error on motion to dismiss, pp. 30 *et seq.*)

The presence of the Northern Trust Company as a bondholder, and of this defendant in error as trustee, as defendants, defeated removal.

Plaintiff in error contends that the Northern Trust Company is not shown by the bill to have any interest. It is true that there is no allegation that it holds bonds, but there are numerous allegations in the bill as to the holders of bonds, and the Northern Trust Company is made a defendant *in that character*. It is as a "holder of over 6,500 bonds issued under said mortgage" that it is made a defendant, and as such its interest is clear under the allegations of the bill.

But counsel assert that under the allegations of the bill it is to be ranged as a complainant. There is no allegation in the bill that "the holders of over 6,500 of the bonds" who are alleged to desire the removal of the plaintiff in error as trustee, desire such action to be had *otherwise than as provided by the deed of trust*. That provides that this defendant in error shall appoint the new trustee. (Pr. Rec., 26.) The bill prays, however, that this shall be done by the Superior Court. (Pr. Rec., 9.) There is no allegation in the bill that the Northern Trust Company or this defendant

in error concur in the filing of the bill, or in its prayer for such relief, which is contrary to the terms of the trust deed. There is nothing, therefore, which makes it clear that the Northern Trust Company should be ranged with the complainant in the bill.

This defendant in error is not alleged to join in, or to accept the contention that the plaintiff in error should be removed as trustee.

It is evident that if this defendant in error had recognized the contention of the complainant as to the incapacity of the Farmers' Loan and Trust Company it should on its own motion and without suit, have appointed a new trustee under the terms of the trust deed. (Pr. Rec., p. 26.)

While the answer of this defendant is not pertinent to the question of removal, it illustrates its position to observe, that its answer put the complainant to proof upon all of the allegations upon which the removal of the Farmers' Loan and Trust Company was sought by the bill, and denies the allegations of wrong intent on the part of that trustee. (Pr. Rec., pp. 39 *et seq.*)

It denies the right of the complainant to any relief (Pr. Rec , 42), and sets up the removal proceedings taken in the United States Circuit Court. (Pr. Rec., 42.)

This plaintiff in error was a necessary party, and necessarily a defendant.

(Brief of this defendant in error on motion to dismiss, pp. 22 *et seq.*)

There is no reason why *Harter* v. *Kernochan*, 103 U. S., 562, cited by counsel, is any more applicable to this case than is any other case where parties are ranged accord-

ing to their interests as shown by the bill. That was a case where taxpayers filed a bill against a county and its bondholders to declare certain of its bonds invalid. There was evidently but one controversy, and that without any element in it, upon which the county could be ranged against the complainant.

Here there is a bill by the mortgagor against the trustee and the bondholders, the mortgagees. The *interests* are adverse between such parties on the face of the bill.

Can a bill be said to disclose a removable cause because it charges against a party whose interests are *prima facie* adverse, acts or agreements favorable to the complainant?

In such a case, it is submitted nothing short of actual joinder or concurrence in the bill, or allegations in the petition for removal of collusion, or co-operation of such party with the complainant, can give any color on an application for removal to a claim that such party must be ranged with the complainant.

There is no allegation in the petition for removal in this case that the Northern Trust Company, or the American Trust and Savings Bank, have in fact concurred in the charges of the complainant, or that they should be ranged with the complainant. The sole claim of the petition is that they are not necessary or proper parties to the controversy between plaintiff in error, and the Lake Street Elevated Railroad Company. (Pr Rec., 32.)

As to the position adverse to the complainant which both the American Trust and Savings Bank and the Northern Trust Company must be presumed to take, upon the question of the appointment of a new trustee by the court, counsel are in error.

They admit that this power of appointment, which is reserved to the remaining trustee, cannot be usurped by the court. (Brief, 89.) Though they thus admit the existence of a material point upon which there was, on the face of the bill, a conflict between the contention of the complainant, and the rights of the American Trust and Savings Bank and the bondholders, they claim that because the claim of the complainant was not maintainable, this contention should be disregarded in passing upon an application for removal.

In other words, because the bill might be demurrable as to part of the relief sought, that part could be eliminated on removal! It will not do to contend that, to determine whether there is a removable controversy all issues of law must be disregarded, and those controversies alone considered which involve issues of fact.

The relief prayed by the bill (Pr. Rec., 9), that a new trustee shall be appointed, *is* pertinent and necessary to afford complete relief under the bill. It is not, as counsel suggest, an instance of a prayer for relief against certain parties which is unsupported by, and not related to, the facts disclosed by the bill.

Counsel have failed to answer, and have practically conceded the position taken on pages 22 *et seq.* of the brief of this defendant in error on the motion to dismiss or affirm. For, by admitting that the new trustee *must* be appointed by the American Trust and Savings Bank, they admit that the decree removing the plaintiff in error must, to be effectual, be made against the bondholders, as represented by the Northern Trust Company, and the co-trustee, the American Trust and Savings Bank.

The list of cases cited by counsel on the proposition

that, because ill taken the prayer as to appointment of a new trustee may be disregarded, comprises only the following:

Landers v. *Felton*, 73 Fed. Rep., 311; *Waraæ* v. *Ry. Co.*, 72 Fed. Rep., 637; *Rivers* v. *Bradley*, 53 Fed. Rep., 305; *Dow* v. *Bradstreet*, 46 Fed., and *Shephard* v. *Bradstreet*, 65 Fed. Rep., 142, are all cases of the joinder of agents—in most instances of engineers or other employees in railway accident cases, where the joinder is alleged in the petition to be collusive. They are all of the class of cases considered by this Court in *Powers* v. *Chesapeake & Ohio Ry.*, 169 U. S., 92, and are utterly inapplicable to this case. The other cases cited by counsel on this point—

Brown v. *Murry Nelson & Co.*, 43 Fed. Rep., 614; *Overman Wheel Co.* v. *Pope Mfg. Co.*, 46 Fed. Rep., 577; *McHenry* v. *R. R. Co.*, 25 Fed. Rep., 65, are merely cases where *agents*, as mere *formal* parties, were disregarded.

(See brief of this defendant in error on motion to dismiss, pp. 13 *et seq.*)

That counsel err in supposing (Brief, p. 89) that this defendant in error could have properly acted under the trust deed if there had not been a decree removing plaintiff in error to which the bondholders and the co-trustee were parties is evident from the cases in Illinois defining the estate and succession of trustees.

(Brief of this defendant in error on motion to dismiss, pp. 23 *et seq.*)

Lawrence v. *Lawrence*, 181 Ill., 248–252.
Butler v. *Butler*, 164 Ill., 171–177.
Penn. Co. v. *Bauerle*, 143 Ill., 459-474.

Stephen v. *Beall*, 22 Wall., 329, cited by counsel as "directly in point" on this question, shows how far they stray from the point.

That case did not involve a trust at all. It merely holds that where one of four joint tenants executes a mortgage purporting to convey the entire estate it operates to convey only the undivided one-fourth owned by the mortagor. No attempt was made on the foreclosure to claim, or to enforce, a lien against anything but the undivided one-fourth interest. The other joint tenants were of course unnecessary parties, and would not have been *proper* parties, for no relief, by partition or otherwise, was sought against them. *That* is the only case counsel cite as to the estate of the co-trustee.

It has already been shown that the position of this defendant-in-error was necessarily that of a defendant.

Counsel suggest, however, that because this defendant-in-error opposed the removal of an unremovable case, it thereby took sides with the complainant.

After the long line of disastrous examples of the futility and waste incurred where removal has been improperly had, this defendant was properly urgent in opposing the jurisdiction of a Court which could not properly decide the issues raised.

Graves v. *Corbin*, 132 U. S., 571, is an example of such litigation, long drawn out to an indecisive conclusion.

At the time removal was sought, this action, opposing the removal, was the only action that this defendant had taken. Can any subsequent proceedings be made to relate back and render erroneous the denial of the petition for removal?

Certainly not in the absence of a new petition and bond for removal, such as were filed in *Powers* v. *Chesapeake, etc., Ry.*, 169 U. S., 92.

See *Doremus* v. *Root*, 94 Fed. Rep., 760.

On this point counsel cite but three cases.

Of these *Pac. R. R. Co.* v. *Ketchum*, 101 U. S., 289, is a case of *original* jurisdiction in the Circuit Court, and therefore inapplicable.

Illinois v. *Ill. Cent. R. R. Co.*, 16 Fed. Rep., 881, is a case where the *interests* were determined solely upon the bill.

Hutton v. *Bancroft & Son Co.*, 77 Fed. Rep., 481, is a case where the identity of the interests of one defendant with those of the complainant, was shown by its answer filed *before* the petition for removal was presented.

On the other hand, we find a uniform line of cases holding that the removability of a case must be determined upon the record at the time the petition is presented. And all questions as to the nature of the controversies involved must be settled without reference even to the petition for removal, unless there are charges of collusive joinder to defeat jurisdiction.

Graves v. *Corbin*, 132 U. S., 571, 585.

Wilson v. *Oswego Township*, 151 U. S., 56–66.

Merchants' Cotton Press Co. v. *N. A. Ins. Co.*, 151 U. S., 368–384 (and cases cited in brief of this defendant in error on motion to dismiss, pp. 16 *et seq.*).

That this defendant was a necessary party, as a representative of the bondholders, as the remaining trustee

who had the right to appoint the new trustee sought to be appointed by the bill, and as a party who would be affected by any decree in the case, because the powers of the trustees under the mortgage are joint, and an injunction or decree disabling one would disable both, has been fully discussed in the brief of this defendant in error on the motion to dismiss. (Brief, pp. 22 *et seq.*)

The seven reasons set out in the brief of counsel for plaintiff in error (Brief, pp. 82 *et seq.*) for holding to the contrary are without force. They may be commented upon most conveniently under paragraphs numbered to correspond with those in counsel's brief.

1. Both the Appellate and Supreme Courts of Illinois held that when, as in this case, the bondholders are numerous, and the ground for removing one trustee does not affect the other, the remaining trustee may properly be considered as representing the bondholders who are not parties.

Farmers' Loan & Trust Co. v. *Elevated R. R. Co.*, 173 Ill., at p. 457.
Ibid v. *Ibid*, 68 Ill. App., 666.

In those courts the question was involved whether there was a joinder of the necessary bondholders to sustain the jurisdiction to remove a trustee. That question, not being a Federal question, is not before this Court. Counsel for plaintiff in error contended very strenuously below that there was a lack of necessary parties in that the bondholders as *cestuis qui trustent* were not all present as parties. The Supreme Court of Illinois held that they were *necessary* parties defendant, but were sufficiently represented by the Northern Trust Company as a bondholder, and by this defendant in error *as a trustee*.

2. This defendant in error certainly represented bondholders in seeing that the new trustee should be appointed only in the manner provided by the trust deed. And as the tying of the hands of one trustee by injunction disabled both, their powers being joint, this defendant represented properly the bondholders upon any action taken with that possible result in view.

3. In this case there is no reason to support the contention that because one *cestui qui trust*, the mortgagor, sought relief, adversely to the interest of the adverse *cestuis qui trustent*, the mortgage bondholders, the trustees should not represent the bondholders. The trust was to protect their bonds, and to secure such protection was the first duty of the trustees.

4. The power to appoint a new trustee is a *several* power in the remaining trustee. As to the appointment he *alone* represents the bondholders.

(5 is omitted in the brief of counsel.)

6 & 7. The fact that some bondholders might not agree with the co-trustee, whose removal was not sought, might give them leave to intervene, if the court should feel their interests were not represented properly, but it would not give them any standing to deny the effect of a decree as against them, if they did not intervene, and the cause proceeded to decree with the co-trustee as their only representative.

While the attitude of this defendant in error subsequent to the denial of the petition for removal is immaterial, it is deemed proper to comment upon some of the statements in the brief of counsel on this point.

The duty and obligation of this defendant depended upon the law, and the terms of the deed of trust, and not

as counsel intimate, at page 92 of their brief, upon the will of a majority of the bondholders. Consequently it required proof of the incapacity of its co-trustee, and denied that the complainant was entitled to the relief sought. It was certainly right as to the manner of appointment of the new trustee, as the decree does not grant the prayer of the bill in this respect. (Pr. Rec., 99.)

Its actions did not partake of the partisan character imputed to them by counsel.

Its answer was not, as counsel intimate (Brief, p. 95), an admission of "all of the allegations of fact in the "bill except one."

It expressly put the complainant on proof as to the non-compliance by the Farmers' Loan and Trust Company with the laws of Illinois (Pr. Rec., 39) and as to its doing business in Illinois without having made such deposit as required by its laws. (Pr. Rec., 40.)

It denies that the Farmers' Loan and Trust Company filed the bill to foreclose to injure or destroy the property of the complainant. (Pr. Rec., 41.)

It sets up the removal proceedings, and "*denies* that "complainant is entitled to the relief or any part thereof "in the said bill of complaint demanded." (Pr. Rec., 42.)

It is curious reasoning that makes the admission in an answer of those facts which three courts have found to be true, evidence of partisanship. The rules of practice in equity, in Illinois as elsewhere, require a full answer, and what is true must be answered, and certainly should not be answered falsely. Certain issues of fact were necessarily conceded, but on the law nothing was conceded by the answer.

The instances where counsel for this defendant took part in the trial, as set out in pages 96 *et seq.* of the brief of counsel, are so trivial that comment upon them is unnecessary.

The briefs filed in this case by this defendant in error have all been filed with the same object in view, of hastening the disposition of this litigation.

One of the chief contentions of this defendant-in-error, namely, its right to appoint the new trustee, is sustained by the decree, so that, while its attitude was one of hostility to the bill on that point, it acquiesces in the decree on that point, and on the jurisdiction of the state courts.

IV.

THERE IS NO FEDERAL QUESTION HERE INVOLVED ASIDE FROM THAT AS TO REMOVAL.

This point is covered in the first instance by the brief of this defendant in error on the motion to dismiss, pp. 36 *et seq.*

If, as has been held, the facts that raise a Federal question do not appear in a bill, it is not removable on the ground that the controversy involves such a question, then it can make no difference whether such facts are, as in the Skottowe case, the Federal incorporation of the company, or as in this case, the alleged pendency of a conflicting proceeding in the Federal courts.

Both are simply facts not appearing of record. But there is no Federal question here under the constitution.

Counsel cite a long line of cases on page 107 of their brief to the effect that the Circuit Court would entertain

a bill to enjoin a suit already begun therein regardless of citizenship. Certainly, because it would be an *ancillary* proceeding.

From this premise counsel leap to the conclusion that this is a removable case, on the ground that it is such as might have been brought as an ancillary suit originally in the Circuit Court.

Non sequitur. And it is not true that this action could have been deemed ancillary. The service of process, not the filing of the bill, determines priority. *This* suit is first, hence it could not be ancillary.

Moreover, the Removal Act of 1888 does not give the right to remove *every* suit "of which the Circuit Courts are given original jurisdiction" thereunder; but only grants removal in certain specified cases, of which this is not one, as has been shown, *supra.*

Tennessee v. *Bank*, 152 U. S., 454, cited by counsel on this point, in no way supports such a result as is contended for. That case simply illustrates the rule that although a suit may involve the decision of a Federal question, and so be prosecuted by writ of error to this Court, it is not removable unless the Federal question appears on the bill as drawn. Even if the question of priority of jurisdiction appeared on the face of the bill in this case it would not be a Federal question.

"When a proposition has once been decided by the "Supreme Court of the United States it can no longer be "said that in it there still remains a Federal question."

Dillon on Removal of Causes, § 79, 5th Ed.

Kansas v. *Bradley*, 26 Fed. Rep., 289.

Black's Dillon on Removal of Causes, § 109.

Inez Mining Co. v. Kinney, 46 Fed. Rep., 832.

Bluebird Mining Co. v. *Largey*, 49 Fed. Rep., 289.

Dickinson v. *Heeb Brewing Co.*, 73 Ia., 705.

Shear v. *Bolinger*, 74 Ia., 757.

The discussion of the question of priority in the brief of this defendant in error on the motion to dismiss (pp. 41 *et seq.*), is met by counsel with the mere suggestions that the foreclosure suit was an action *in rem*, and that the subpœna of the Circuit Court could not be served, because of the *prior* injunction of the state court. These contentions are unsupported by authorities and obviously of no weight.

Under the well-settled rule, whether in foreclosure or in other proceedings, service of process determines priority.

The power and jurisdiction of the state court to make effectual its jurisdiction over the subject-matter and the parties here involved, by enjoining further litigation of questions of which it disposed by its decree, are beyond contradiction. While the general rule is that state courts will not enjoin parties to actions in the Federal courts from prosecuting them, this case comes clearly within the exception that state courts may protect their jurisdiction over subject-matters and parties, and may enforce their decress by such injunctions.

Moran v. *Sturges*, 154 U. S., 256–270.

It is respectfully submitted that the decree of the Supreme Court of Illinois of affirmance should be affirmed by this Court.

T. A. Moran,

Levy Mayer,

Solicitors for The American Trust and Savings Bank, Trustee, Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

Farmers' Loan and Trust Company,
Plaintiff in Error,
vs.
Lake Street Elevated Railroad Company, The American Trust and Savings Bank, and The Northern Trust Company, of Chicago,
Defendants in Error.

Writ of Error to the Supreme Court of Illinois.

Motion to Dismiss the Writ of Error or for Affirmance.

Brief and Argument on Behalf of the American Trust and Savings Bank, Defendant in Error.

MAY IT PLEASE THE COURT:

The bill in this case sought the removal of the Farmers' Loan and Trust Company (plaintiff in error) as trustee, under a trust deed executed by the defendant in error (Lake Street Elevated Railroad Company), and running to the plaintiff in error and this defendant in error as trustees. That trust deed secured bonds in the usual form, and contained many elaborate provisions defining the powers and duties of the trustees.

This defendant in error was a defendant to the bill, and filed an answer thereto putting the com-

plainant, the Lake Street Elevated Railroad Company, to proof of all of its charges against the plaintiff in error. The Superior Court of Cook County, Illinois, rendered a decree removing the plaintiff in error from its trusteeship, enjoining it from doing any further acts as trustee, and directing this defendant in error as trustee to appoint a new trustee according to the terms of the trust deed. From this decree the Farmers' Loan and Trust Company alone prayed and was allowed its separate appeal. Thus this defendant and its co-defendant in the trial court, the Northern Trust Company, were joined as appellees on the record on appeal in the Appellate and Supreme Courts of Illinois, and stand as defendants in error in this Court.

The interest of this defendant in error in the result of this case, arises solely from its position as a trustee of the trust estate created by the trust deed. This defendant in error owes to its trust the duty of presenting upon the present motion, such considerations as it is advised will throw some light upon the questions involved in this hearing.

The record discloses that the plaintiff in error asserts, that there was a separable controversy in this case solely between it on the one hand and the Lake Street Elevated Railroad Company on the other.

The record further discloses that the learned District Judge holding the Circuit Court of the United States for the Northern District of Illinois, considered this defendant in error and the Northern Trust Company as properly ranged on the same side with the Lake Street Elevated Railroad Company on the issues involved in the bill; that on that ground he permitted a transcript of the record to be filed in the Circuit Court, and denied a mo-

tion to remand the case to the Superior Court, although that court had prior to such first order, denied a specific motion (after protracted argument) of plaintiff in error for the removal of the case (certificate of evidence, p. 666).

No attempt will be made to give in full the record (or rather the bill of complaint, which is alone to be considered on the question of removability) upon which the position of this defendant in error must rest. All of the facts are accurately stated in the brief filed by counsel for the Lake Street Elevated Railroad Company. It is, however, proper to state, that the learned District judge has entirely mistaken the position of this defendant in error. Neither the bill in this case nor any part of the record discloses any attempt on the part of this defendant in error (the American Trust and Savings Bank) to prevent or interefere with a forclosure of the trust deed.

The charge that it has done so is based, so far as the question of the removal of the case is concerned, *solely* upon the allegation of the bill of complaint, that this defendant in error after a full investigation of the affairs of the mortgagor, refused to join as complainant with the Farmers' Loan and Trust Company in a proceeding for the foreclosure of the trust deed based upon certain defaults in the payment of interest. While the bill alleged that *certain bondholders* desired that plaintiff in error should be removed as trustee, *no such allegation was made respecting this defendant in error.*

Although this record does not disclose the whole of the progress of this case in the Federal Circuit Court, where the transcript of the record was filed, the litigation as the record discloses, is still pending in that court.

In view of the fact that the opinion of the Supreme Court of Illinois is, in any event, a conclusive interpretation of the statute under whose provisions the plaintiff in error was held to be incompetent to act as trustee, and was therefore removed, every consideration of expediency is on the side of the maintenance of the jurisdiction of the state court. It is obvious that the only question presented for determination by this Court is that of the jurisdiction of the state Superior Court; and that that in no way affects the *force* of the decision of the Supreme Court of the state, as a *construction* of the state statute.

Inasmuch as the case is one which was not removable, the writ of error in this case causes a serious delay in the final adjustment of the trust estate, and prolongs a condition of uncertainty and confusion which is harmful alike to the interests of the mortgagor and of the bondholders. Not only its realization of the value to the trust estate of an early termination of this litigation, but also its belief in the soundness of the position of the state courts on the jurisdictional questions involved, lead this defendant in error to present the following suggestions:

BRIEF.

I.

THE BILL DOES NOT DISCLOSE A SEPARABLE REMOVABLE CONTROVERSY.

(*a*) The removability of the case must be determined solely upon the case made by the bill.

Merchants' Cotton Press Co. v. *N. A. Ins. Co.*, 151 U. S., 368, 384.

(*b*) The dominating purpose of the bill is the removal of the trustee and the appointment of a new trustee; all other questions are auxiliary and not severable controversies.

Desty Removal of Causes, 3d Ed., pp. 269–271.

Black's Dillon on Removal of Causes, § 144.

Corbin v. *Van Brunt*, 105 U. S., 576.

Shainwald v. *Lewis*, 108 U. S., 158.

Winchester v. *Loud*, 108 U. S., 130.

Torrence v. *Shedd*, 144 U. S., 527.

(*c*) The joinder of the co-trustee and the bondholders as defendants defeats the removal of any controversy involved in the bill. The co-trustee being a joint tenant is a necessary party.

Golder v. *Bressler*, 105 Ill., 419, 434.

The powers and duties of the trustees being *joint* powers the co-trustee is a necessary party.

Pennsylvania Co. v. *Bauerle*, 143 Ill., 459.

The co-trustee and bondholder defendants were necessary defendants to render relief under the bill complete and effectual.

Guion v. *Melvin*, 69 N. C., 244.

Wilson v. *Oswego Township*, 151 U. S., 56.

(*d*) Even if *proper* parties only the joinder of the co-trustee and the bondholder as defendants defeated removal.

A case is not removable of which the Federal courts could not take original jurisdiction.

Pittsburg, C. & St. L. Ry. Co. v. *Baltimore & Ohio R. R. Co.*, 22 U. S. App., 359.

Wetherbee v. *Stinson*, 18 U. S. App., 714.

In re Cilley, 58 Fed. Rep., 977.

In re Pennsylvania Co., 137 U. S., 451.

Railroad Co. v. *Davidson*, 157 U. S., 201.

The co-trustee cannot be ranged with the mortgagor.

Shipp v. *Williams*, 22 U. S. App., 380.

II.

THERE IS NO FEDERAL QUESTION INVOLVED.

The bill does not disclose any Federal question, and one cannot be injected into the case by the petition for removal.

Oregon Short Line, etc., Ry. v. *Skottowe*, 162 U. S., 490.

Walker v. *Collins*, 167 U. S., 57.

The alleged conflict between state and Federal courts does not involve a Federal question.

The petition for removal on the ground that a Federal question is involved must be by all defendants.

Thompson v. *C., St. P. & K. C. Ry. Co.*, 60 Fed. Rep., 773.

Black's Dillon on Removal of Causes, § 77.

III.

THE SUPERIOR COURT HAD JURISDICTION AND POWER TO DENY THE PETITION FOR REMOVAL, AND DID NOT LOSE JURISDICTION OF THE CASE BECAUSE THE FEDERAL CIRCUIT COURT SUBSEQUENELY ALLOWED A TRANSCRIPT OF THE RECORD TO BE FILED IN THE CIRCUIT COURT AND DENIED A MOTION TO REMAND.

The order denying the motion to remand was interlocutory and not *res adjudicata*.

Missouri, etc., R. R. v. *Fitzgerald*, 160 U. S., 556.

The question of removability in this case being one of law, only, the state court had power to pass upon it.

Gregory v. *Hartley*, 113 U. S., 742.

Burlington Ry. Co. v. *Dunn*, 122 U. S., 513.

C., C., C. & St. L. Ry. Co. v. *Monaghan*, 140 Ill., 474.

White v. *Holt*, 20 W. Va., 792; 111 U. S., 134.

The decision of the state court being correct, it did not lose jurisdiction by reason of the action of the Federal Circuit Court in allowing the record to be filed therein and denying a motion to remand.

Florence Sewing Machine Co. v. *Grover & Baker Co.*, 110 Mass., 70; S. C., 1 Holmes, C. C. Rep., 235; 18 Wall., 553.

Vannevar v. *Bryant*, 21 Wall., 41; S. C., 106 Mass., 180.

Johnson v. *Brewers Fire Ins. Co.*, 51 Wis., 570.

Chesapeake & Ohio R. R. Co. v. *White*, 111 U. S., 134.

ARGUMENT.

This case was not removable to the United States Circuit Court. There was lacking the requisite diversity of citizenship of parties. There was no Federal question involved.

The contention of plaintiff in error that there was a separable controversy is without merit, and no possible reason can be discovered in the bill for ranging the co-defendants of the Farmers' Loan and Trust Company against it, and with the complainant, the Lake Street Elevated Railroad Company.

It is submitted that the bill does not contain separable controversies; in fact it contains only one controversy, to which all parties of record are necessary parties. Even if the bill disclosed separable controversies, it is not removable, because of the presence of parties whose citizenship defeats removal.

I.

THE BILL DOES NOT DISCLOSE A SEPARABLE REMOVABLE CONTROVERSY.

Of course, the determination of the removability of the case must be determined solely upon the bill.

Merchants Cotton Press Co. v. *N. A. Ins. Co.*, 151 U. S., 368, 384.

Graves v. *Corbin*, 132 U. S., 571, 585.

Stated briefly, the allegations of the bill are as follows:

"Your orator * * * shows * * * that at "the time said mortgage was so made * * * said "The Farmers' Loan and Trust Company, being such "corporation under the laws of the State of New York, "had not, prior thereto, nor has it since complied with "the laws of the State of Illinois. * * * That at the "time of the execution * * * and acceptance of "said trust under said mortgage, your orator did not "know that said The Farmers' Loan and Trust Company "had not complied with the laws of the State of Illi-"nois. * * *

"Your orator further shows * * * that one "William Ziegler, * * * conspiring * * * "with various persons * * * made a demand upon "said The Farmers' Loan and Trust Company, and said "The American Trust and Savings Bank, that they pro-"ceed to foreclose said mortgage. * * * That your "orators filed a bill * * * enjoining * * * said "The Farmers' Loan and Trust Company and The Amer-"ican Trust and Savings Bank from taking any action "* * * to foreclose said mortgage, under the request "* * * by said William Ziegler and others, repre-"senting 605 of said 610 bonds. Your orator further "shows * * * that it was informed by said William "Burry, as agent for said The Farmers' Loan "and Trust Company that * * * notwith-"standing that no other person was asking * * * "any action * * * that it proposed to and would "file a bill to foreclose the said mortgage for failure to "pay the interest upon the bonded indebtedness aforesaid. "* * * That notwithstanding the parties * * * "holding or representing the coupons on the bonds due "July 1, 1895, and January 1, 1896, have made no de-"mand or request upon said The Farmers' Loan and "Trust Company * * * other than said 610 bonds, "yet said The Farmers' Loan and Trust Company in "violation of its duty, and for the purpose of injuring "and destroying the property and assets of your orator, "intended to and will * * * attempt to foreclose "said mortgage or trust deed. * * *

"Forasmuch, etc., orator prays * * *

1st. "That a new trustee may be appointed by the

" court to act under and by virtue of said mortgage or " deed of trust, attached hereto. * * *

" 2nd. That an injunction *pendente lite* may be issued " restraining and enjoining said The Farmers' Loan and " Trust Company from taking any proceedings or bring- " ing or prosecuting any suit or suits, or acting in any " manner whatsoever, under and by virtue of said mort- " gage or deed of trust, and that upon the final hearing " hereof said injunction may be made perpetual.

" 3rd. That orator may have such other and further " and different relief as equity may require."

The three controversies other than the alleged Federal question, alleged in the petition for removal to be presented by this bill, are stated by the plaintiff in error in its petition as follows:

1. " A controversy concerning the right of your pe- " titioner to act as trustee under the mortgage, a copy of " which is attached to said bill of complaint."

2. " A controversy concerning the removal of your " petitioner as trustee under said mortgage."

3. " A controversy concerning the enjoining of your " petitioner from taking any proceedings, or bringing or " prosecuting any suits or acting under and by virtue of " the terms, provisions and conditions of said mort- " gage."

It is to be noted that each of these three statements of the questions raised by the bill, involves only the power and right of the Farmers' Loan and Trust Company to take any action whatever under the trust deed.

There was no pretense that there was in this bill any special or distinct contest over foreclosure, until the parties came before Judge Grosscup, before whom a foreclosure contest was *pending in another case*. When this bill was filed, as it distinctly alleges, there was already an injunction in force against bringing foreclosure at the instance of certain bondholders. The bill brought by plaintiff in error for foreclosure, was filed almost simultaneously

(within a few minutes prior) with this bill, and this bill therefore had and could have had nothing to do with that foreclosure bill, except as the latter happened to come within the general scope of the prayer of this bill.

As to parties, the only allegation of the petition is as follows:

"Your petitioner further shows that if the controversy "in this case is one and inseparable, then *that such con-* "*troversy is wholly between citizens of different states,* "*and can be fully determined between them and that* "*said controversy is between your petitioner on one part,* "*and the said Lake Street Elevated Railroad Company* "on the other part, and that said other defendants, the "the American Trust and Savings Bank and the Northern "Trust Company, are not *proper or necessary* parties to "this cause."

It will be noted that this, the only allegation of the petition as to parties, is one wherein the bill is treated as containing *but one controversy.* That of course is the contest over *removal of the trustee.* Yet jurisdiction was taken by the Circuit Court on the ground that there was jurisdiction of a *separable* controversy concerning foreclosure. (*Lake St. El. R. R. Co.* v. *Farmers' Loan & Trust Co.*, 72 Fed. Rep., 804.)

The dominating purpose of the bill is the removal of the trustee and the appointment of a new trustee, which becomes necessary upon such removal.

That this relief is sought cannot be denied. That it covers and includes all else cannot be fairly denied. Should the court, where there are no allegations in the petition for removal, of fraud and collusion in the framing of the bill, and where the relief asked is sustained by the allegations of the bill, declare that the bill is in reality filed merely to reach an end

auxiliary to the main relief asked? Clearly not. Yet the Circuit Court held that the dominant purpose of the bill in this case was to prevent a foreclosure by an injunction. (72 Fed. Rep., 804, 807.) The rule is that, in order to rest the determination of the question of jurisdiction on any other ground than that disclosed by the bill, it must be alleged in the petition for removal and proved, that the relief sought is not sought of right, but is asked merely to defeat Federal jurisdiction.

In *Waraæ* v. *C. N. O. & T. P. Ry. Co*, 72 Fed. Rep., 637, the rule is thus announced:

"Plaintiff's petition seeks to hold the railroad company and Snyder, its engineer, as joint tortfeasors. If, on the statements in the petition he is able to do so, then the cause is not removable (*Railroad* v. *Wangelin*, 132 U. S., 599; *Pirie* v. *Tredt*, 115 U. S., 41; *Sloan* v. *Anderson*, 117 U. S., 275; *Plymouth Consol. Min. Co.* v. *Amador & S. Canal Co.*, 118 U. S., 264; *Hedge Co.* v. *Fuller*, 122 U. S., 535), unless it be made to appear to the satisfaction of the court that one of the defendants was fraudulently joined for the purpose of defeating the jurisdiction of the Federal court. *In order that such joinder should be regarded as fraudulent, it must appear by allegation and proof*, not only that it was made for the purpose of avoiding the jurisdiction of the Federal Court but also that the averments of the petition upon which the right to join the defendants is claimed, are so unfounded and incapable of proof as to justify the inference, that they were not made in good faith with the hope and intention of proving them, or else that they do not state a joint cause of action."

So, in *Hukill* v. *Maysville & B. D. Co.*, 72 Fed. Rep., 745, the Court says:

"The history of the cause conclusively shows that the co-defendants of the Chesapeake and Ohio Railway Company were joi[illegible] for the purpose of avoiding the jurisdiction of this court. (See 65 Fed. Rep., 138.) But

"this alone would not justify the removal of the suit "against the Chesapeake and Ohio Railroad Company. "It must also appear, *either by the averments of the peti-* "*tion* that no cause of action is stated against the other "defendants, or that they are, in law, improperly joined, "or it must be shown by the proof that the averments of "fact upon which the joint liability of the co-defendants "* * * is asserted, are so palpably unfounded and "untrue as to make it improbable that the plaintiff coul'' "have inserted them in his petition in a *bona fide* belief "that he could make proof of them on trial."

Upon this point, the Superior Court (Judge Payne) said in disposing of the petition and motion for removal:

"Now, as to the second point, it is probably true that "*the gist of this controversy is whether the Farmers'* "*Loan and Trust Company may act as trustee in this* "*state*, but it follows, I think, that no fair adjustment "*of that controversy* can be had without the American "Trust and Savings Bank being a party to the suit. "True it is, that if the court should hold that the Farm- "ers' Loan and Trust Company might act as trustee, "there would be nothing to do but to dismiss the bill. "If, on the contrary, it held that it could not exercise "that function, then the court would be in duty bound to "appoint *or require the trustee, the American Trust and* "*Savings Bank, to appoint another trustee.* Counsel "have argued with some force that one trustee is as "good as two. The fact remains that the parties "when this contract was made determined that they "required two trustees. They not only selected "two trustees, but went to the trouble of "providing, that in case of resignation or removal, or "ceasing or incapacity to act of one, the other shall ap- "point a successor. It is not for the court to make con- "tracts for people. It cannot be urged that a second "trustee is not necessary. *It has been suggested that the* "*object of this bill, while not perhaps stated*—the object "of the bill, aside from the removal of the trustee, *is to* "*enjoin the Federal court from the foreclosure of the* "*mortgage.* It does not seem to me that that question "arises on this motion. I think this court would be slow

"to grant an injunction restraining the Federal court "from doing anything, and I should want a good deal of "argument to satisfy me that the state court had a "right to interfere with the Federal court on any such "question. If there be such an injunction, the state "court, I think, would be always open to hear a motion "to dissolve; so I do not think that that question is "properly before the court on this motion. Under the "circumstances, I am bound to decline to remove the "cause, and therefore deny the motion."

Judge Payne held the removal of the trustee to be the main object of the bill, and that that issue involved the appointment of a new trustee, and was therefore, one upon which this defendant in error was a necessary party *defendant*.

The Illinois citizenship of the American Trust and Savings Bank and of the Northern Trust Company necessarily defeat Federal jurisdiction over the sole controversy presented by the bill.

It is submitted that it appears on the face of the bill that the *dominant purpose* thereof is to remove the Farmers' Loan and Trust Company as a trustee, and that this defendant in error is a necessary party, and necessarily a defendant.

In fact Judge GROSSCUP says (72 Fed. Rep., 804, 806):

"*If the sole purpose of this bill were to remove the* "*Farmers' Loan and Trust Company as trustee* under "the trust deed, there could be no doubt of the *indis-* "*pensableness of either the bondholders or their remain-* "*ing trustee as parties to the suit.*"

The examination of the entire record (if such examination is permissible under the law) will not show a separable controversy. The attempt to inject into this discussion so much of the record as shows the foreclosure proceedings instituted by plaintiff in error in the Federal

court on the same day that this bill was filed, will not do. The question whether there is in this suit a separable controversy upon which plaintiff in error was entitled to a r[e]moval, must be determined exclusively by the state of t[he] pleadings and the record in this case when the petition for removal was filed, and not by the allegations of that petition, or by any other proceedings had either in the United States or in the state court. Neither the petition for removal nor the answer filed by plaintiff in error to the bill, nor any other pleading than the bill itself, can be resorted to for the purpose of determining the existence or non-existence of a separable controversy.

This court, in *Wilson* v. *Oswego Township*, 151 U. S., 56, says, on p. 66:

"The question whether there is a separable controversy "warranting a removal to the Circuit Court of the United States must be determined by the state of the "pleadings, and the record of the case at the time of the "application for removal, and not by the allegations of "the petition therefor, or the subsequent proceedings "which may be had in the Circuit Court";

and, as said by this Court in *Barney* v. *Latham*, 103 U. S, 205, on pp. 215, 216:

"The right of removal, if claimed in the mode prescribed by the statute, depends upon the case disclosed "by the pleadings as they stand when the petition for "removal is filed."

The subject was carefully considered, and the authorities reviewed in *Fergason* v. *Chicago, M. & St. P. Ry. Co.*, 63 Fed. Rep., 177, thus:

"Under this clause of the statute regard is had solely "to the cause or causes of action declared upon and set "forth by the plaintiff in his petition or declaration. By "the rulings of the Supreme Court in *Ayers* v. *Wiswall*, "112 U. S., 187, 5 Sup. Ct., 90; *Railroad Co.* v. *Ide*, "114 U. S., 52, 5 Sup. Ct., 735; *Pirie* v. *Tvedt*, 115

" U. S., 41, 5 Sup. Ct., 1034, 1161; *Starin* v. *City of* " *New York*, 115 U. S., 248, 6 Sup. Ct., 28; *Sloane* v. " *Anderson*, 117 U. S., 275, 6 Sup. Ct., 730; *Safe De-* " *posit Co.* v. *Huntington*, 117 U. S., 280, 6 Sup. Ct., " 733; *Plymouth Consol Gold Min. Co.* v. *Amador* " *& S. Canal Co.*, 118 U. S., 264, 6 Sup. Ct., 1034— " and other cases based thereon, it is well settled that the " question of the existence of a separable removable contro- " versy is to be determined upon consideration of the " allegations of the petition; that the defendants by sep- " arate answers or defenses, cannot create a separable " controversy, within the meaning of the statute, out of " a cause of action upon which the plaintiff has " declared jointly; and therefore the true query is " whether the case as made and set forth in the petition " or declaration of the plaintiff is or is not separable into " parts 'so that in one of the parts a controversy will be " presented with citizens of one or more states on one " side and citizens of different states on the other, which " can be fully determined without the presence of the " other parties to the suit as it has been begun.' *Ayres* " v. *Wiswall*, 112 U. S., 187, 5 Sup. Ct., 90. If the " plaintiff in fact counts or declares upon one cause of " action, and no more, then the case cannot contain a " separable controversy."

See, also, Black's Dillon on Removal of Causes, Sec. 141, under the caption, " *Separable controversy must appear from plaintiff's pleading.*"

a. *The minor questions involved as to foreclosure, etc., are not separable controversies.*

The proposition which this defendant in error presents, as the settled rule of the Federal courts, is that where there is a dispute over a question dependent upon and a part of, the main controversy in the case, such dispute is not a severable controversy. So in this case, the dispute about the right of the plaintiff in error to maintain a bill to foreclose for non-payment of interest, is auxiliary to,

and a part of the controversy over the removal of appellant as trustee.

Such a minor or auxiliary matter of difference, whether affecting all of the parties, as in this case, or only affecting some of the parties, as in some of the cases that are cited below, abides the jurisdiction over the main controversy.

It is not necessary to contend that under the bill relief could be had by way of an injunction against foreclosure, even if the bill did not seek the removal of plaintiff in error as trustee. Foreclosure by plaintiff in error was enjoined on the ground that such relief was necessary to make effectual its removal as trustee.

It was conceded that the controversy over the removal of the trustee was not removable to the Federal Court. (72 Fed. Rep., 804.) That being so, the Superior Court of Cook County had undoubted jurisdiction to retain and proceed with that controversy to final decree, if such controversy was the only or an inseparable controversy. The Superior Court has proceeded to a final decree removing the Farmers' Loan and Trust Company as trustee; and as *a necessary part of that decree*, it has enjoined that company from any attempted action under the trust deed in question.

The relief by injunction sought by this bill is merely subsidiary, and therefore, does not constitute a separable controversy within the meaning of the statute

Desty Removal of Causes, 3d Ed., pp. 269-271, sections 96*x*, 96*y*.

Black's Dillon on Removal of Causes, Sec. 144.

In *Corbin* v. *Van Brunt*, 105 U. S., 576, this Court says:

"The real controversy is about the right to the pos-"session of the land in dispute," and this Court held "that "the whole case *depends* upon the question of title be-"tween the Van Brunts (of New York) on one side and "the New York defendants on the other. This contro-"versy was not removable. That of the other defend-"ants is a mere adjunct of the principal dispute. It can-"not exist separately. The case is therefore within the "principle of Removal Cases, 100 U. S., 457, decided "after the order under review was made. *Blake* v. "*McKinn*, 103 U. S., 336, and *Hyde* v. *Ruble*, 104 U. "S., 407. In no just sense can it be said that the plead-"ings present separate controversies, such as admit of "separate and distinct trials. If they do not, there could "be no removal under the second clause of the act of "March 3, 1875, C. 137, any more than under the "first."

So in the particular case at bar there could not be two hearings, one as to the removal of the trustee and one as to enjoining foreclosure. The hearing for the settling of the rights of the parties as to the removal of the trustee would include and cover the other issues as "mere adjuncts."

The subject-matters of the bill are cognate and interwoven and all of the relief prayed is necessary to attain the one object of the bill—the removal of plaintiff in error as trustee, and the nomination and appointment of a new and competent trustee.

See, also,

Shainwald v. *Lewis*, 108 U. S., 158.
Ellis v. *Sisson*, 11 Fed. Rep., 353.

In *Frazer* v. *Jennison*, 106 U. S., 194, this Court says:

"To entitle a party to a removal under the second

"clause of the second section of the act, there must exist "in the suit *a separate and distinct cause of action*, with "all the parties on one side of that controversy citizens "of different states from those on the other. *To say the* "*least*, the case must be one *capable of separation into* "*parts*, so that in one of the parts a controversy will be "presented with citizens of one or more states on one "side, and citizens of other states on the other, which "can be *fully determined without the presence of any* "*other parties to the suit* AS IT HAS BEEN BEGUN."

In *Winchester* v. *Loud*, 108 U. S., 130, this Court says:

"The case presents a *single controversy*, although it "involves the *determination of several questions*. It "may be that Winchester is the principal defendant in "interest, *but full and complete relief cannot be afforded* "*in respect to the single cause of action, to wit: the* "*trust, without the presence* of all the parties to the suit."

That was, like the present suit, a bill touching the administration of a trust and seeking the removal of certain of the trustees, and the rule there laid down governs this case.

In *Thurber* v. *Miller*, 14 U. S. App., 432 (67 Fed. Rep., 371, 373), the court (8th Circuit) of its own motion, examined the question of removal, and upon the point here under discussion says:

"A bill for the foreclosure of a mortgage which asks "for a decree for the amount of the mortgage debt * * * "and alleges that the lien of the complainant's mortgage "is prior and superior to the liens of *some* of the defend- "ants named in the bill, presents but a single cause of "action. The ascertainment of the relative rank of the "liens *is incidental to the main purpose of the suit.* The "cause of action is the subject-matter of the controversy, "*and that is, for all the purposes of the suit, whatever* "*the plaintiff declares it to be in his pleadings. Rail-* "*road Company* v. *Ide*, 114 U. S., 52, 56; *Torrence* v. "*Shedd*, 144 U. S., 537, 530. * * * The case "made by the bill is one that cannot be fully determined,

"and the relief sought obtained, without the presence of "the heirs and executors of the mortgagor, *and it makes* "*no difference whether they admit or deny the rights of* "*the complainant, their presence is nevertheless indispen-* "*sable to the complete determination of the controversy.*"

In *Torrence* v. *Shedd*, 144 U. S., 527, Mr. Justice GRAY formulated a general rule, which has been accepted in subsequent cases as expressing the law on this subject. He said:

"But in order to justify such removal on the ground "of a separate controversy between citizens of different "states, there must, by the very terms of the statute, be "a controversy which can be *fully* determined as between "them; *and by the settled construction of this section* "*the whole* subject-matter of the suit must be capable of "being finally determined as between them and *complete* "relief afforded as to the separate cause of action, with- "out the presence of others originally made parties to "the suit. See to the same effect *Deposit Co.* v. *Hunt-* "*ington*, 117 U. S., 280; *Bellaire* v. *Railroad Co.*, 146 "U. S., 117; *Hanrick* v. *Hanrick*, 153 U. S., 192; "*Barth* v. *Coler*, 60 Fed., 466."

Black's Dillon on Removal of Causes says (Sec. 144), after referring to the rule laid down by this Court in *Torrence* v. *Shedd*, *supra:*

"It appears, therefore, that the controversy which will "warrant the removal of the suit must be the main issue, "or at least a separable part of the main, principal or "original case, and not merely an incidental controversy, "which may arise during the progress of the cause. "* * * And if the main issue in the case—the prin- "cipal contention or question in controversy, upon the "solution of which the disposition to be made of the en- "tire case must ultimately depend—is single and in- "severable, and all parties are interested in it, in so far "as that the eventual determination of the rights and "liabilities of all of them must be settled by its settle- "ment, although the rights and duties attaching to them "may be distinct and even unlike, then it cannot be said

"that the case includes a separable controversy as to any "one of such defendants."

(*b*) But if it be conceded for the purpose of further argument that the bill discloses a separable controversy, it will be found that the cause is not removable, because of the presence on the record of this defendant in error and the presence also of the Northern Trust Company.

Whether it be contended that the removable controversy is one over *foreclosure*, or one over the *removal* of the plaintiff in error as trustee, the American Trust and Savings Bank as trustee, and the Northern Trust Company as a bondholder are *necessary* parties to the determination of such controversy, and, being citizens of Illinois, defeat removal of the cause.

It has been shown that this bill seeks the removal of one of the two trustees appointed by the trust deed.

To ascertain what the decree which removes one trustee means, or what the effect would be of a decree enjoining the Farmers' Loan and Trust Company "from taking "any proceedings or bringing or prosecuting any suit or "suits, or acting in any manner whatsoever under and by "virtue of said mortgage or deed of trust," as prayed by the bill, the duties, title and interest of this defendant in error, as trustee, must be examined.

What may be called the "stake-holder" cases, *where a neutral party, or even one disclaiming any interest is held to be a necessary party*, show that the question depends on the *necessity* of the joinder of such party in order to afford and make *effectual* the relief asked.

Wilson v. *Oswego Township*, 151 U. S., 56.
Thayer v. *Life Ass'n*, 112 U. S., 717.
Wetherbee v. *Stinson*, 62 Fed. Rep., 174.

By the common law, and under an express provision of the statutes of Illinois, the estate of trustees is held in joint tenancy.

Sec. 5, Chap. 30 (on conveyances), Rev. Stat. Ill., of 1874, reads as follows:

"No estate in joint tenancy, in any lands, tenements or "hereditaments, shall be held or claimed under any grant, "devise or conveyance, whatsoever, heretofore made "*other than to executors and trustees*, unless the prem- "ises therein mentioned shall expressly be thereby de- "clared to pass, not in tenancy in common, but in joint "tenancy; and every such estate, *other than to executors* "*and trustees* (unless otherwise expressly declared as "aforesaid) shall be deemed to be in tenancy in "common."

In *Golder* v. *Bressler*, 105 Ill., 419, 434, the Supreme Court of Illinois says:

"It is clear that by the common law, and also by an "express provision of the statute, the estate of trustees "is held in joint tenancy * * *"

Of course, as a joint tenant holding the legal title, this defendant in error is a necessary party to an action to determine the title of its joint tenant; and the title being held as a security, is a necessary party to a bill seeking to restrain the enforcement of the security.

In *Lambert* v. *Hyers*, 22 Ill. App., 616, the Court says:

"In a suit in chancery, upon a trust deed, in the na- "ture of a mortgage, the grantee in such deed, in whom "the legal title is vested, is an *indispensable party*. "*Walsh* v. *Truesdell*, 1 Ill. App., 126, and authorities "there cited."

This defendant in error is the party of the *second part* in the trust deed under discussion, and as the grantee of the legal title, and as one of the trustees in whom all right to foreclose is primarily vested, is an absolutely in-

dispensable party to this bill, affecting as it does the entire administration of the trust created by the trust deed. Let the provisions of the trust deed be briefly examined.

There is no survivorship under this trust deed. If one trustee fails, then by the express terms of the trust deed, his powers vest only in a new trustee to be appointed by the remaining co-trustee—*the remaining co- trustee cannot act alone.*

(*a*) The deed is made to *both* trustees.

(*b*) The conveyance "grants, bargains and sells" the property to *both* trustees and their successors.

(*c*) The *habendum* clause creates an estate in *both* trustees, "their successors and assigns, in trust nevertheless."

(*d*) The *proviso* is to the effect that upon payment of the bonds, the trust shall cease, and *both* trustees shall execute a discharge of the mortgage.

(*e*) The deed provides for the certification of the bonds issued, and to be issued, by *both* trustees.

(*f*) The instrument provides how an additional issue of bonds of over 6,500 (an additional issue is shown by the record to have been made) shall be issued, and then certified by, and disposed of under the direction of *both* trustees.

(*g*) *Both* trustees may appoint a *joint* agent to attend meetings of the board of directors, examine the works of the railroad company, with reference to the application and expenditure of the proceeds of the bonds.

(*h*) Insurance is to be effected in companies satisfactory to *both* trustees, the policies to be payable to the trustees, and kept by them.

(*i*) If default is made in the payment of principal or interest, *both* trustees *may*, under certain circumstances, act, and under other circumstances *shall* act.

(*j*) If default continues for six months, if indemnity is given to the trustees, *they* shall, under certain circumstances, *take possession of the road, operate it, appoint agents, pay taxes and indebtedness, etc.*

(*k*) If there is six months default, upon request in writing by a majority, and upon being indemnified to their satisfaction, *both* trustees may foreclose, etc.

(*l*) The right of action under the trust deed "is vested "exclusively in the *trustees*," and only in case of a refusal "on the part of the *trustees* to perform any duty "imposed on them by this indenture," can bondholders proceed.

(*m*) The trustees never need proceed at the request of bondholders, unless "evidence satisfactory to the *trust*-"*ees*" shall be furnished of the ownership of the bonds.

(*n*) "The *trustees* shall permit such necessary changes "to be made in the line of said railroad as may be in "*their* judgment advisable."

(*o*) The *trustees* may, under certain circumstances, release for purposes of sale any part of the real property covered by the mortgage, the proceeds to be invested in other property, to be subjected to the mortgage, or if not invested, to be turned over to the *trustees*.

(*p*) If proceeds reach the trustees, *they* shall apply the same to the purchase or redemption of bonds.

(*q*) "The *trustees* may consent to the release of that "part of the railroad within the south division of the "City of Chicago, upon such conditions as *they* may im-"pose."

(*r*) Neither of the trustees shall be required to take any steps in the execution of the trusts unless given reasonable indemnity by the bondholders, and the *trustees* shall be entitled to a reasonable compensation, etc.

(*s*) The word "Trustee or Trustees as used in this instrument shall be held to mean" *both trustees*.

Even if the Farmers' Loan and Trust Company were capable of acting, but is to be removed for mere abuse of its trust, and is to be enjoined from acting *pendente lite*, the restraint upon the co-trustee is certainly a restraint upon this defendant in error; for being *joint* trustees one cannot act alone.

All of the duties and powers enumerated above are *joint* powers and duties.

In *Pennsylvania Co. etc.* v. *Bauerle*, 143 Ill., 459, 474, the court says:

"The powers vested in the trustees must be executed "strictly, and where a trust or power is delegated to two "or more jointly, for mere private purposes, the con- "currence of all who are intrusted with the power is "necessary to its due execution; and this rule applies as "well to trusts coupled with an interest as to cases of "mere naked powers. [Citing] *Green* v. *Miller*, 6 Johns, "39; *Franklin* v. *Osgood*, 14 Johns, 527; *Sinclair* v. "*Jackson*, 8 Cow., 443; *Peter* v. *Beverly*, 10 Pet., 532; "*Lancashire* v *Lancahsire*, 2 Phillips, 165; *Leggett* v. "*Hunter*, 19 N. Y., 445; 2 Perry on Trusts (3d Ed.), "Sec. 493."

See, also,

McGeorge v. *Big Stone Gap Imp. Co.*, 57 Fed. Rep., 262.

Brinkerhoff v. *Wemple*, 1 Wend., 471, 474.

1 Lewin on Trusts, star page 606, Sec. 11.

(1st.) *This defendant in error is necessarily ranged and joined as a defendant to the bill, because the relief sought affects its powers.*

Joint powers cannot be executed by this defendant in error alone. Even after the removal of plaintiff in error this defendant cannot act alone. It must appoint, or there must be appointed under the provisions of the trust deed, a new trustee.

Enjoining action by its co-trustee necessarily enjoins this defendant in error. Such a proceeding will not lie unless both trustees are before the court. Such an attempt at injunction against some trustees without having their co-trustees before the court, was held bad in

Wall v. *Thomas*, 41 Fed. Rep., 620.

This defendant in error was necessarily a party defendant to a suit brought against the other trustee affecting the performance of the trust.

Barbour on Parties, 631.

Hutchinson v. *Ayres*, 117 Ill., 558.

Broadway National Bank v. *Adams*, 130 Mass., 431.

(2nd.) *This defendant in error and the Northern Trust Company were necessarily defendants, because, in order to obtain complete relief they must be bound by the decree removing plaintiff in error, and must be bound by the appointment of a new trustee.*

In *Guion* v. *Melvin*, 69 N. C., 244, the court says:

"We cannot agree with the District judge that the removal of one trustee and the substitution of another is "a thing which can be done on *ex parte* motion. Before "the constitution of 1868 it could only be done on a bill "in equity *to which the trustee and all the cestuis que "trust were necessary parties.*"

"It is a proceeding in which each of them may have "an important interest. It may be that the trustee has "made advances or incurred liabilities on the faith of "the trust property, or is entitled to compensation for his "services as trustee. And it may be that some or most "of the *cestuis que trust* desire him to continue to act as "trustee for their interests. Important questions of title "to property may be involved; it cannot be maintained "that such rights can be determined on an *ex parte* application by one or several only of the *cestuis que "trust.* Those who were not parties to the proceeding "for the removal of the trustee clearly could not be "bound by it, and any order so made would be a source "of litigation and confusion."

To similar effect are

Headrick v. *Price*, 10 Lea, 15.

Bear v. *Am. Tel. Co.*, 36 Hun, 400.

Broadway Bank v. *Adams*, 130 Mass., 431.

(3rd) This defendant in error insisted in its answer that the complainant was *not* entitled to the appointment of a new trustee by the Superior Court as prayed by the bill. In this position, which is a material and important controversy arising on the bill, the plaintiff in error and this defendant in error are certainly upon the same side of the case, *and both are against the complainant*, the Lake St. El. R. R. Co.

But certainly this defendant in error is at least a *proper* party defendant on all of the matters involved in the bill. Under the authorities its presence would defeat removal.

If there are controversies, separable or not involved in this case, upon which the parties cannot be so arranged that there will be complete diversity of citizenship between those on one side and those on the other side, this bill will not be one of which the United States Circuit Court would have *original* jurisdiction; and, consequently, it is not a removable case.

It has already been shown that the American Trust and Savings Bank, as trustee, as holder of an estate in common with the trustee sought to be removed; *and as the representative of the bondholders other than the bondholding defendant, the Northern Trust Company*, and that bondholder itself, are *absolutely indispensable parties*. But even if they are *proper* parties only, removal is defeated.

Under the removal act of 1887, as corrected August 13, 1888 (1 Sup. to Rev. Stat., 611, and notes—25 Stat. at Large, 433), a case is removable only where it is such a case that it would be cognizable if *originally* brought in the Circuit Court. For convenience the section on removals is quoted:

"Sec. 2. That any case * * * arising under the "Constitution or laws of the United States or treaties "* * * *of which the Circuit Courts of the United "States are given original jurisdiction* by the preceding "section * * * may be removed by the defendant "or defendants. * * *

"Any other suit * * * of which the Circuit "Courts of the United States *are given jurisdiction* by "the preceding section * * * may be removed into "the Circuit Court * * * by the defendant or de- "fendants therein *being non-residents of that state.*

"And when IN ANY SUIT MENTIONED IN THIS SECTION "there shall be a controversy which is wholly between "citizens of different states, and which can be fully de- "determined as between them, then *either one or more* of "the defendants actually interested in such controversy "may remove said suit into the Circuit Court." * * *

This case must be one of which the Federal courts would have *original* cognizance, under either one or other of the first two paragraphs of the above section, in order to sustain the petition for removal. The language of the statute is clear and unambiguous.

This case is one of which it cannot be successfully contended that the Federal courts would have *original* cognizance under the above section.

The presence of even a *proper party* who is not a *necessary* party defeats *original* jurisdiction, if he is a citizen of the same state as his adversary. To get rid of such objection, such *proper* party must be dismissed by the complainant out of the case.

In *Pittsburg C. & St. L. Ry. Co.* v. *Baltimore & Ohio R. Co.*, 61 Fed. Rep., 705, 712; 22 U S. A., 359, there was before the court the case of a proper party who was a citizen of the same state as his adversary. The Circuit Court of Appeals, Sixth Circuit, says:

"The Central Ohio was, perhaps, an unneccessary party.

"* * * In view of this attitude of the Central Ohio "toward the issues presented, we cannot say that it was "an immaterial party. It certainly was not so regarded "by the other litigants nor by the Circuit Court. Being a "*proper* party * * * it makes a cause in which a "corporation of Maryland and a corporation of Ohio are "are one side of the controversy, while another corpora- "tion of Ohio is a party upon the opposite side. This "arrangement operates to deprive the Federal court of "jurisdiction. The very late case of *Wilson* "v. *Oswego Tp.*, 14 Sup. Ct., 259 (151 U. S., 56, 65), "is a case much in point. There Federal jurisdiction "was held to be defeated as to a defendant whom the "court thought an unnecessary party to the relief sought "by the complainant, yet a *proper* party because of its "interest in the controversy. We are clearly of opinion "that while the Central Ohio was not a necessary party "to the accounting between the Baltimore and Ohio "Railroad Company and the Pittsburgh, Cincinnati and "St. Louis Railway Company, yet it was, in view "of its interest in the issues arising, upon that account a "*proper* party. The decree must be reversed, with di- "rections to the Circuit Court to dismiss the bill with "costs."

See, also,

Wetherby v. *Stinson*, 62 Fed. Rep., 173;
10 C. C. A., 243; 18 U. S. App., 714.

Cases arising under the act of 1875, and which may be cited as being apparently *contra*, are inapplicable, because the intent and effect of the acts of 1887-1888 were to restrict the number of cases removable to the Federal courts, and the rules applicable to them are radically different from those applying to the act of 1875 as respects removals.

In the carefully considered case of *In re Cilley*, 58 Fed. Rep., 977, the Court says:

"There is authority to the point that the purpose of

"the act of 1875 was to make the jurisdiction of the "Circuit Court coextensive with the constitutional grant "of judicial power, except in cases in which the Su- "preme Court had exclusive jurisdiction (citing cases); "but however this may be, such was not the purpose of "the acts of 1887–1888.

"There is a wide difference between the removal pro- "visions of the act of 1875 and the acts of 1887–1888 as "will be seen upon examination. The act of March 3, 1875, "provided through section 1:

"'That the Circuit Courts of the United States shall "have original cognizance, concurrent with the courts "of the several states, of all suits of a civil nature at "common law or in equity when the matter in dispute "exceeds.' etc.

"Section 2 provided:

"'That in any suit of a civil nature, at law or in "equity, now pending or hereafter brought in any state "court, where the matter in dispute exceeds, etc., * * * "or *in which there shall be a controversy between citizens "of different states*, * * * EITHER *party may re- "move said suit* into the Circuit Court of the United "States for the proper district. And when in *any* suit "mentioned in this section there shall be a controversy "which is wholly between citizens of different states,' "etc.

"*It will be observed that the second section, which au- "thorizes removal, is broader than the first section, which "grants original cognizance upon the Circuit Court*, and "herein lies the difference between the acts of 1875 and "1887. It is manifest that under the act of 1875 suits "or controversies not originally cognizable in the Circuit "Court might ripen into a suit removable under section "2. It will be seen that in describing suits of a civil "nature at law or in equity, removable under section 2, "*there is no reference to the preceding section and there is "therefore in section 2 no reference to the suits of a civil "nature* at common law or in equity, described in section "1. * * * And it will be further seen that in the "last part of section 2 the provision is 'when in any suit "mentioned in this section there shall be a controversy,'

"etc. The removability, therefore, under the act of "1875 was to be determined upon the force of section "2, without any reference to the jurisdictional grant of "section 1, or to the common law phrase used therein. "Under *this section* (1875) there was a strong ground "for holding that *original* jurisdiction was not the test of "removability, and that ANY controversy between citi- "zens of different states which had taken the form of a "suit of a civil nature, at law or in equity, might be re- "moved and the weight of authority unquestionably sus- "tains this view.

"*But the jurisdiction of this court depends upon the "acts of 1887–88 and not upon the act of 1875.*

"We must therefore look to the acts of 1887–88 for "the purpose of determining whether jurisdiction exists "to administer justice in a probate proceeding of this "character.

"Section 1 of the acts of 1875 and 1887–88 are in sub- "stance the same, but as has been observed, there is a "wide difference between section 2 of the acts of 1887– "88, which authorizes removals, and section 2 of the act "of 1875. Section 2 of the acts of 1887–88 first "provides:

"'That any suit of a civil nature, at law or in equity, "arising under the Constitution or laws of the United "States, or treaties made or which shall be made under "their authority, of which the Circuit Courts of the "United States are given *original* jurisdiction by the "preceding section,' may be removed.

"It next provides:

"'That any other suit of a civil nature at law or in "equity, *of which the Circuit Courts of the United "States are given jurisdiction by the preceding* section, "and which are now pending or which may hereafter be "brought in any state court, may be removed into the "Circuit Court of the United States for the proper dis- "trict *by the defendant or defendants therein, being non- "residents of the* state.'

"IT WOULD SEEM THAT THE FIRST TWO CLAUSES OF "SECTION 2 CONTAIN ALL THE JURISDICTIONAL GRANT EM- "BODIED IN THE SECOND SECTION, AND DESCRIBE AND "LIMIT THE SAME, and in both instances refer directly to

" suits of a civil nature pending in the state courts, *of* " *which the Federal Courts are given jurisdiction by the* " *preceding section.* It is true that section 2 further " provides that: ' When in any suit *mentioned in this* " *section* there shall be a controversy which is wholly be- " tween citizens of different states, and which can be fully " determined as between them, *then either one or more* of the " defendants *actually* interested in such controversy may " remove.' * * * And this is followed by the further " clause that, where a suit is now pending, or may here- " after be brought, it may be removed on the ground of " local prejudice, etc. But it does not seem to us that " this enlarges the limit *stated in the second clause*, for " the reason that *there are no suits ' mentioned in this sec-* " *tion ' aside from those embodied in the first and second* " *clauses of the section, in both of which reference is* " *made, as has been observed, to the preceding section;* " and we must assume that the third clause of section " two, which gives the right of removal to one of several " defendants, and the fourth clause, which gives the right " of removal of a suit on the ground of local prejudice, " *have reference to cases included within the first and* " *second clauses.* (Citing cases.)

" *In other words, the third clause gives the right of* " *removal to one of the several defendants, and the fourth* " *clause gives the right of removal on the ground of prej-* " *udice and local influence; or in other words still, the* " *first and second clauses of section 2 define the classes of* " *cases which may be removed, while* THE THIRD AND " FOURTH CLAUSES MERELY GIVE THE RIGHT OF REMOVAL " IN THE SAME CLASS OF CASES TO PARTICULAR PARTIES, " AND UPON PARTICULAR GROUNDS. The only enumera- " tion of removable cases is in the first part of the section, " and it is reasonable to assume that if it was intended to " enlarge the classes in the latter part of the section which " gives the right of removal to one of several defendants " as a matter of right, and to all at any time before trial, " if local prejudice is established, it would have given " some intimation of the particular cases which were in- " tended to be covered, and which were not included " within the general terms embodied in the first and sec- " ond clauses.

" We are not unmindful of the fact that there is con-
" trary judicial expression in some of the circuits; but,
" having in mind that the distinct point has been deter-
" mined by the Supreme Court in the case last men-
" tioned " (*In re Pennsylvania Co.*, 137 U. S., 451,
" 454, 456), " and that the statute of 1887 was ' mainly
" designed for the purpose of restricting the jurisdiction
" of the Circuit Courts of the United States ' (*Smith* v.
" *Lyon*, 133 U. S., 315, 320), and as has been often de-
" clared by the Supreme Court, was ' to contract, not to
" enlarge, the jurisdiction ' (*Shaw* v. *Mining Co.*, 145
" U. S., 444, 449; *In re Pennsylvania Co.*, 137 U. S.,
" 451, 454), ' to restrain the volume of litigation pour-
" ing into the Federal Courts, and to return to the
" standard of the judiciary act ' (*Fisk* v. *Henarie*, 142
" U. S., 459, 467), we are not left in doubt as to the
" proper construction of the section under consideration.
" And it follows as a result that, as that part of section 2
" *which defines and limits the removable causes makes*
" *reference to the jurisdiction given by the preceding sec-*
" *tion, we must look to the preceding section for the pur-*
" *pose of ascertaining our authority in respect to the case*
" *now before us.*"

In re Pennsylvania Co., 137 U. S., 451, 456, this Court gives the same construction to section 2, and says, after quoting the act:

" Here the first two clauses expressly require an
" amount exceeding two thousand dollars. The third
" clause, in referring to ' any suit mentioned in this sec-
" tion,' evidently means the two first clauses of this
" section, and, of course, is limited to cases in which the
" matter in dispute exceeds two thousand dollars."

In re Cilley is quoted with approval by the court *In re Foley*, 76 Fed., 390.

In *Copeland* v. *Bruning*, 72 Fed., 5, 9, the Court says:

" The case of *In re Cilley*, 58 Fed., 977, contains an
" elaborate discussion of the question by Judge Aldrich,
" whose opinion is concurred in by Judge Colt. In that
" case it was held that the right of removal is restricted

" by section 2, of the acts of 1887–1888, *to the classes of* " *cases in which original jurisdiction is given by section* " *1.* * * *"

In *McNulty* v. *Connecticut Mut. Life Ins. Co.*, 46 Fed. Rep., 305, the court says:

" Under the act of 1887, as amended by that of 1888, " to justify a removal on the ground of diverse citizen- " ship *it must appear that the case is* ONE OF WHICH THE " FEDERAL COURT COULD TAKE JURISDICTION ORIGI- " NALLY, UNDER THE PROVISIONS OF THE FIRST SECTION OF " THE ACT. * * * As it does not appear that this " court would have had jurisdiction originally over this " cause, it cannot take it by removal, and the motion to " remand is, therefore, sustained."

The same rule is supported by the rulings of this Court in

Tennessee v. *Union & Planters Bank*, 152 U. S., 454.

Railroad Co. v. *Davidson*, 157 U. S., 201.

See, also,

Texas & Pacific Ry. Co. v. *Cody*, 166 U. S., 606, 609.

In re Stutsman, 88 Fed. Rep., 337, 341.

As this case stands now, it is one of which the Circuit Court could not take *original* cognizance, and lacking *original* jurisdiction, the same cannot be conferred by removal.

The bondholder, the Northern Trust Company, is at least a *proper* party, and necessarily a defendant in interest. Such is clearly the law.

Guion v. *Melvin*, 69 N. C., 244.

Sherman v. *Burnham*, 6 Barb., 403.

Headrick v. *Price*, 10 Lea, 15.

Bear v. *Am. Tel. Co.*, 36 Hun, 400.

And the American Trust and Savings Bank, trustee, having the legal title and being the proper representative before the court of the other bondholders, is likewise at least a *proper* party, and necessarily a defendant in interest.

Shipp v. *Williams*, 62 Fed. Rep., 4; 22 U. S. App., 380.
Broadway Bank v. *Adams*, 130 Mass., 431.
Wall v. *Thomas*, 41 Fed. Rep., 620.
Barbour on Parties, 631.
Guion v. *Melvin*, 69 N. C., 244.

They are not mere formal parties in any event because they have an actual interest in the controversy.

If this were an original bill in the Circuit Court the complainant would at least have to dismiss as to these parties, or suffer the dismissal of the bill.

Wetherby v. *Stinson*, 62 Fed. Rep., 173; 18 U. S. App., 714; 10 C. C. A., 243.
Hicklin v. *Marco*, 56 Fed. Rep., 549; 6 C. C. A., 10.

II.

THERE IS NO FEDERAL QUESTION INVOLVED.

The petition for removal states, as above shown, three controversies which it is claimed are involved *on the face of the bill*, and a fourth, which it seeks to inject into the bill as a "Federal question" by allegations of fact in the petition for removal.

This last contention may be summarily disposed of. *A Federal question to be ground of removal must be*

disclosed by the bill alone. The facts from which it arises cannot be added to the record by the petition for removal.

In *Oregon Short Line, etc., Ry.* v. *Skottowe*, 162 U. S., 490, 494, this Court says:

"We think that the present case comes within the rule "that the Federal question, or the Federal character of "the defendant company, must appear from the com- "plaint in the action in order to justify a removal, and "that such Federal question or character does not so "appear. There is no propriety in further considering "that rule, because the reasons of it were fully set forth "in the case of *Tennessee* v. *Union & Planters Bank*, "152 U. S., 454, and again in the very recent cases of "*Chappell* v. *Waterworth*, 155 U. S., 102; *East Lake* "*Land Co.* v. *Brown*, 155 U. S., 488, and *Postal Tel.* "*Cable Co.* v. *Alabama*, 155 U. S., 482."

See, also,

Walker v. *Collins*, 167 U. S., 57.

Black's Dillon on Removal of Causes, Sec. 112.

Florida v. *Charlotte H. P. Co.*, 74 Fed. Rep., 578, and cases cited therein.

If the alleged question were open to discussion it would be speedily seen that it was not a Federal question. If a Federal question arises every time a state court issues an injunction which may, or actually does, enjoin a person from prosecuting an action in a Federal court, the state court's power would be ridiculously curtailed. For the very moment such court attempts to control a person, that person is enabled to take the matter in controversy out of its control!

As already stated, plaintiff in error endeavored to inject into this suit a "Federal question" by alleging in

its petition for removal that this suit is an interference with the Federal court in which the foreclosure suit was instituted. The bill in this case in no way sought to interfere with the Federal court. It prayed that plaintiff in error should be enjoined from taking any proceedings, or bringing any suit, or acting in any manner under the trust deed. It is impossible to support upon that prayer the charge that the state court by this bill interfered with the Federal court. Courts of chancery have long asserted jurisdiction to enjoin parties from litigating in another forum.

"The injunction is directed not to the court, but to "the litigant parties, and in no manner denies the juris- "diction of the legal tribunal. It merely seeks to con- "trol the person to whom it is addressed. * * *"

1 High on Injunctions (3rd Ed.), Sec. 45.

And, again, in Sec. 46, the same author says:

"While, therefore, equity may in proper cases enjoin "suitors in another court when proceeding with their "cause, the injunction cannot operate upon or run against "the judge of such court."

The origin of this jurisdiction of a court of chancery and its exercise is discussed with his usual learning by Professor Pomeroy, in Vol. 3 of Equity Jurisprudence, Sec. 1360 *et seq.*

It is difficult to imagine how it can be seriously contended that plaintiff in error was entitled to a removal on the ground that this suit came within the language of the constitution and Federal statute, and is one

"arising under the constitution or laws of the United "States, or treaties made, or which shall be made under "their authority."

This Court, in *Starin* v. *City of New York*, 115 U. S., 248, in discussing this question, says:

"The character of a case is determined by the ques-
"tions involved. If, from the questions, it appears that
"some title, right, privilege or immunity, on which the
"recovery depends, will be defeated by one construction
"of the constitution, or of a law of the United States,
"or sustained by the opposite construction, the case will
"be one arising under the constitution or laws of the
"United States within the meaning of that term as used
"in the acts of Congress."

A case, however, does arise under the laws of the United States simply because a Federal court decided one way on the motion to remand, and the state court, upon the same question of law, decided another way.

Leather Manufacturers' Nat'l Bk v. *Cooper*, 120 U. S., 778.

State of Kansas v. *Bradley*, 26 Fed. Rep., 289.

Inex Mining Co. v. *Kinney*, 46 Fed. Rep., 832.

The doctrine is thus summed up by Judge THAYER in his monograph on Federal Courts, Sec. 22:

"A case is said to arise under the constitution
"and laws of the United States whenever its
"correct decision depends upon the construction
"of either, or whenever the constitution, laws,
"or treaties of the United States create or confer
"the right, privilege, claim or title on which the plaint-
"iff relies in whole or in part for a recovery. A case is
"one of Federal cognizance whenever it becomes neces-
"sary to construe the constitution, laws or treaties of the
"United States."

The law is summarized with equal brevity in Black's Dillon on Removal of Causes, Sec. 109, thus:

"It is not enough to bring a case within the Federal
"jurisdiction on the ground we are now considering
"(Federal question) that one of the parties bases his
"claim on the constitution or an act of Congress, or that

"the determination of the issue will involve the construc-
"tion or application of the Federal law. There must
"be a controversy or dispute between the parties, and
"that controversy must be not merely upon a question
"of fact, but upon the validity, interpretation, effect, or
"applicability of a law of the United States."

Applying any of the tests referred to, how can it be successfully contended that a bill (assuming it to have been the express purpose of that bill) to enjoin a defendant from beginning or prosecuting a suit to foreclose, involves a Federal question, because the defendant should perchance file its bill to foreclose in a Federal court? Certainly, in the issues raised by this bill there is none in the determination of which a question does or necessarily will arise under the Federal constitution or laws, and there is no controversy the determination of which will depend upon the solution of such question.

See

Black's Dillon on Removal of Cases, Sec. 110.

The only connection between the foreclosure bill referred to in the petition for removal and the bill in this case is, that to some extent they involve the same subject-matter, namely, the trust under the mortgage in controversy; and there is an evident possible conflict over this subject-matter between two original jurisdictions, *each* of which has taken independent jurisdiction.

In such a case the fact of the prior suit in the one jurisdiction is, if of any force whatever, *a matter of defense* in the subsequent suit in the other jurisdiction. It is as a matter of abatement or defense that it must be presented and not as a ground of removal.

Chittenden v. *Brewster*, 2 Wall., 191, 197.

Service was first had in this suit. In such case the *first* suit is that in which service is *first* had, and the court in which that suit is brought is entitled to retain it, free from interference.

Desty Removal of Causes, Sec. 73a.

Rorer on Interstate Law (2nd Ed.), pp. 16, 17.

Union Mut. Life Ins. Co. v. *University of Chicago*, 6 Fed., 443. (This circuit; DRUMMOND, J.)

Ward v. *Todd*, 103 U. S, 327.

Moran v. *Sturges*, 154 U. S., 256.

Covell v. *Heyman*, 111 U. S., 176.

Taylor v. *Taintor*, 16 Wall., 366.

Foster v. *Bank*, 68 Fed. Rep., 723.

Sharon v. *Terry*, 36 Fed. Rep., 337.

Foley v. *Hartley*, 72 Fed. Rep., 570.

Merritt v. *Steel Barge Co.*, 79 Fed. Rep., 228.

Zimmerman v. *So Relle*, 80 Fed. Rep., 417.

The injunction writ in this case was served on plaintiff in error as the record shows, on the 30th of January, 1896. On the 31st of January plaintiff in error filed in the Superior Court its petition and bond for removal. On the 1st of February it filed its *written motion* for removal; on the 3d of February it urged its motion for such removal, and upon the denial of such motion, took an exception; made a motion for and was allowed time in which to file its certificate of evidence.

February 6th summons was served on plaintiff in error.

To recapitulate the facts as to the priority of the Superior Court bill the following is submitted:

U. S. CIRCUIT COURT.	SUPERIOR COURT.
Jan. 30, 10:35 a. m. Bill to foreclose filed and process issued to and retained by complainant's (plff. in error) solicitor in his possession until Feb. 18, 1896.	Jan. 30, 11 a. m. This bill filed and process and injunction issued-
	Jan. 30, 11:10 a. m. Injunction writ served on agent of plaintiff in error.
	Jan. 31. Appearance of plaintiff in error in Superior Court, its bond and petition for removal filed therein, and its written motion filed praying for order granting removal.
	Jan. 31. Appearance Northern Trust Co.
Feb. 1. Appearance and demurrer of this defendant in error	Feb. 1. Appearance of this defendant in error.
	Feb. 6. Service of summons on plaintiff in error.
Feb. 18, 1896. Service of summons on Lake St. El. R. R. Co. (deft. in error).	

The presentation of the bond and petition, the motions for removal, for time to file a certificate of evidence, and the argument before the Superior Court, constituted a general appearance giving the Superior Court jurisdiction over the parties and subject-matter prior to any jurisdiction over the same in the United States Circuit Court upon the bill to foreclose.

Sayles v. *N. W. I. Co.*, 2 Curtis, 212—Fed. case No. 12,421.

Tallman v. *B. & O. R. R. Co.*, 45 Fed. Rep., 156.

Wabash R. R. Co. v. *Brow*, 65 Fed. Rep., 941; 13 C. C. A., 222.

Caskey v. *Chenoweth*, 62 Fed. Rep., 712; 10 C. C. A., 605.

Construction Co. v. *Simon*, 53 Fed. Rep., 1.

See, generally, on appearance and jurisdiction:

Foley v. *Hartley*, 72 Fed. Rep., 573.

Howlett v. *S. C. L. I. Co.*, 56 Fed. Rep., 162.

Central Trust Co. v. *S. At. R. R. Co.*, 57 Fed. Rep., 3.

Moran v. *Sturges*, 154 U. S., 256.

But this inquiry is not controlling, because, whichever way it leads, it does not involve a Federal question.

Whether one court or the other has prior jurisdiction is not a Federal question.

Even if a Federal question were involved, the petition for removal was insufficient for removal upon that ground, because all of the defendants did not join.

Under the removal act of 1887 as corrected by the act of August 13, 1888, the only cases removable from state to Federal courts are those provided for as follows:

"Sec. 2. That any case * * * arising under the "Constitution or laws of the United States or treaties, "* * * of which the Circuit Courts of the United "States are given *original* jurisdiction by the preceding "section * * * may be removed *by the defendant* "*or defendants.*" * * *

"Any other suit * * * of which the Circuit "Courts of the United States are given jurisdiction by "the preceding section * * * may be removed into "the Circuit Court * * * by the defendant or de-"fendants therein, *being non-residents of that state.*

"And when IN ANY SUIT MENTIONED IN THIS SECTION "there shall be a controversy which is wholly between "citizens of different states, and which can be fully de-"termined as between them, then *either one or more* of "the defendants actually interested in such controversy "may remove said suit into the Circuit Court." * * *

(Then follows clause as to local prejudice.)

Stated briefly, under this act of 1887–1888 there are four classes of removable cases.

1. Those involving Federal questions and of which the Federal courts have original jurisdiction. These may be removed only by *all* defendants.

2. All other cases of which the Federal courts have original jurisdiction. These may be removed only by *all* defendants, and they must all be non-residents of the state where the action is brought.

3. *Cases of which the Federal courts would have original cognizance*, including *both* of the above classes, *where there is a separable controversy*. In such case one or more defendants, resident or non-resident, may remove the case.

4. Cases where local prejudice is alleged.

Unless this case comes under the third class of removable cases, as above stated, it can be removed *only upon petition of all the proper parties defendant.*

That it does not come under this third class has already been shown.

A case is removable on the ground that it contains a Federal question *only upon the petition of all the defendants.*

In *Thompson* v. *Chicago, St. P. & K. C. Ry. Co.*, 60 Fed. Rep., 773, the court says:

"The first clause of section 2 of the removal act of "1875 (18 Stat., 471) is similar to the second clause of "section 2 of the act of 1887. (Supp. Rev. St., 812.) "The only difference between the two clauses is that "under the act of 1875 it is provided that either party "might remove the suit, while under the act of 1887 it "is provided that the *defendant or defendants*, being non-"residents of the state, may remove it. It was well set-

"tled under this clause of the act of 1875 that a removal "could not be effected unless *all* the parties on the same "side of the controversy united in the petition, and I "think there is no doubt that the same rule must be held "to apply to this clause of the act of 1887. *Ruckman* v. "*Land Co.*, 1 Fed., 367; *Smith* v. *McKay*, 4 Fed., 353; "*Rogers* v. *Van Nortwick*, 45 Fed., 513. It follows "that as one of the defendants in this action did not join "in the petition for removal, the case was not properly "removed to this court under this clause of the act of "Congress.

"The second clause of the second section of the act of "1875 provided that, wherever there should be a contro- "versy which was wholly between citizens of different "states, and which could be fully determined as between "them, then either one or more of the plaintiffs or de- "fendants actually interested in such controversy might "remove the suit into the Circuit Court. The third clause "of the second section of the act of 1887 is identical "with this clause of the act of 1875, except that the "words 'plaintiffs or' have been omitted. It is well "settled that this clause of the acts of 1875 and 1887 "governs that class of cases only *where there are two or* "*more controversies involved in the same suit*, one of "which controversies is wholly between citizens of dif- "ferent states. In the case before us there is but a single "controversy, a joint cause of action against all the de- "fendants, and hence the case would not be removed to "this court under this clause of the act."

We are aware of no decision of this Court upon this point. The almost unbroken line of authorities sustain the position contended for.

Black's Dillon on Removal of Causes, Sec. 77.

Desty Removal Causes, 3d Ed., Sec. 96a.

W. U. Tel. Co. v. *Brown*, 32 Fed. Rep., 337.

Rogers v. *Van Nortwick*, 45 Fed. Rep., 513.

Court was an adjudication which was sought by the plaintiff in error, and the parties should be bound *by it and allowed to question it only upon appeal.*

The question whether or not this case was removable to the Federal courts is one of law, pure and simple.

The sole inquiry is whether the bill, the petition and bond for removal, presented, *as a matter of law*, a case removable to the Federal courts. It is not contended that, where upon the bill, or upon the petition for removal, the right to remove depends upon *the existence of certain facts*, the state court has any power to determine such facts.

But it is submitted that where the question of the right to remove is presented as a naked legal question of *general law*, arising on an admission of the facts stated in the bill, petition and bond, upon *the submission* of that question to the state court, its determination thereof should be binding collaterally. It is evident from the statutes and precedents that the state tribunal has at least *concurrent* jurisdiction to pass upon the sufficiency in law of the petition and bond.

In *Gregory* v. *Hartley*, 113 U. S., 742, 745, this Court says:

"The District Court (a state court) *was not bound to* "*surrender its jurisdiction until a case was made which* "*on the face of the record showed that the petitioners* "*were in law entitled to a removal.*"

In *Burlington Railway Co.* v. *Dunn*, 122 U. S., 513, 515, Mr. Chief Justice WAITE, after reviewing previous authorities, says upon this question:

"At the last term it was found that this question had "become a practical one, about which there was a differ- "ence of opinion in the state courts, and to some ex-

"tent in the Circuit Courts. And so, in deciding *Stone* "v. *South Carolina*, 117 U. S., 430, we took occasion "to say: '*All issues of fact* made upon a petition for "removal must be tried in the Circuit Court, but "the state court is at liberty to determine for itself "whether on the face of the record a removal has been "effected.' It is true, as was remarked by the su- "preme judicial court of Massachusetts, in *Amy* v. *Mann-* "*ing*, 144 Mass., 153, that this was not necessary "to the decision in that case, but it was said on full con- "sideration and with the view of announcing the opinion "of the court on that subject. Only two weeks after "that case was decided, *Carson* v. *Hyatt* came up for "determination, in which the precise question was di- "rectly presented, as the allegation of citizenship in the "petition for removal was contradicted by a statement "in the answer, and it became necessary to determine "what the fact really was. We there affirmed what had "been said in *Stone* v. *South Carolina*, and decided that "it was an error in the state court to proceed further "with the suit after the petition for removal was filed, "because the Circuit Court alone had jurisdiction to try "*the question of fact* which was involved. This rule "was again recognized at this term in *Carson* v. *Dun-* "*ham*, 421 U. S., 121. * * *

"To our mind it is the true rule and calculated to "produce less inconvenience than any other. The theory "on which it rests is that the record closes, so far as the "question of removal is concerned, when the petition "for removal is filed and the necessary security fur- "nished. It presents then to the state court a pure ques- "tion of law, and that is whether, admitting the facts "stated in the petition for removal to be true, it appears "on the face of the record, which includes the petition "and pleadings and proceedings down to that time, that "the petitioner is entitled to a removal of the suit. That "question the state court has the right to decide for it- "self, and if it errs in keeping the case, and the highest "court in the state affirms its decision, this court has "jurisdiction to correct the error, considering for that "purpose only the part of the record which ends with "the petition for removal."

Again, in *Crehore* v. *Ohio, etc., Railway Co.*, 131 U. S., 240 244, Mr. Justice HARLAN, reviewing the authorities, says:

"It thus appears that a case is not in law removable "from the state court upon the ground that it involves a "controversy between citizens of different states, unless "at the time the application for removal is made the "record upon its face shows it to be one that is remov- "able. We say 'upon its face' because 'the state court "is only at liberty to inquire whether on the face of the "record a case has been made which requires it to pro- "ceed no further, and '*all issues of fact* made upon the "petition for removal must be tried in the Circuit "Court.'"

See, also,

Fashnacht v. *Frank*, 23 Wall, 416.

Insurance Co. v. *Pechner*, 95 U. S., 183, 185.

Stone v. *S. Carolina*, 117 U. S., 430.

Williams v. *Association*, 47 Fed. Rep., 533.

Missouri Pac. Ry. v. *Fitzgerald*, 160 U. S, 556.

Besides the case of *Amy* v. *Manning*, 144 Mass., 153, cited in *Burlington Ry. Co.* v. *Dunn*, *supra*, there are numerous decisions of state courts, upholding the jurisdiction of the state courts to pass upon the right of removal where it depends upon a *question of general law* on the face of the bill, petition and bond.

C., C., C. & St. Ry. Co. v. *Monaghan*, 140 Ill., 474, 484.

Darst v. *Bates*, 51 Ill., 440, 448.

Broadway National Bank v. *Adams*, 130 Mass., 431, 433.

Edwards Mfg. Co. v. *Sprague*, 76 Me., 53, 62.

McWhinney v. *Brinker*, 64 Ind., 360.

Springer v. *Sheets*, 115 N. Car., 370.

Goddard v. *Bosson*, 21 Kan., 139 (Opinion by Brewer, J.)

Johnson v. *Brewers' Fire Ins. Co.*, 51 Wis., 570.

State v. *Johnson*, 29 La. Ann., 399.

Dunn v. *Burlington R. R.*, 35 Minn., 73.

Security Co. v. *Pratt.*, 65 Conn., 161.

Mabley v. *Judge Superior Court*, 41 Mich., 31.

Delaware Ry. Co. v. *Davenport Ry. Co.*, 46 Iowa, 406, 409.

Blair v. *West Point Mfg. Co.*, 7 Neb., 146, 153.

Augur v. *E. Tenn. Ry. Co.*, 74 Ga., 634.

It is urged that a party defeated in the state court should not be permitted to have a case docketed in the United States Court and give that court jurisdiction, after the petition for removal has been submitted upon a specific motion of petitioner to a state court, and such court has held that the case was not removable. To do so would make the jurisdiction which this Court has declared to exist in the state courts and which so many state courts of last resort have claimed and exercised, a source of humiliation and confusion to the state tribunals.

Van Fleet on Collateral Attack, Sec. 117, says:

"The state and Federal courts exercising jurisdiction "over the same territory and persons, their officers will "occasionally clash, and it will be a long time before the

"dividing line between them will become so definite and "settled as to be free from doubt. When a debatable "question arises, the court to which it is presented must "hear and decide it; and for the other court to disregard "the decision is simply usurpation. The two sets of "courts complement each other, and together they pos- "sess complete jurisdiction over all judicial matters, and "for any error committed by either in respect to such "jurisdictional questions the Supreme Court of the "United States is the final arbiter."

See, also, Sec. 685, *ibid.*

Dillon on Removal of Causes, 5th Ed., Sec. 45, says:

"And the decision of the state court that the cause of "action is entire, and that no separable controversy ex- "ists, is a decision which it is proper for the Federal "courts to follow."

The right of the Superior Court to proceed in this very case, is established by the decision of the Circuit Court of Appeals of the Seventh Circuit, upon an appeal from an interlocutory order entered by the Circuit Court of the United States after it had denied the motion to remand made in this litigation.

Lake St. L. R. R. Co. v. *Farmers' Loan and Trust Co.*, 77 Fed. Rep., 769; 23 C. C. A., 448.

In considering what the Circuit Court of Appeals says as to the result of the decision of the Superior Court on the petition for removal, it should be borne in mind, that the record before the Circuit Court of Appeals merely showed the denial of the petition for removal, and did not show (because at that time the decree of the state court had not been rendered) that the Superior Court had proceeded to a *final* decree.

The Circuit Court of Appeals answered the contention

made before it, that the state court had no power to retain the case by saying:

"While it is beyond dispute that a state court, when "a petition for removal of a cause is presented, has "*jurisdiction* to decide for itself whether there ought to "be a removal (citing cases), it is equally certain that the "petitionor, notwithstanding an adverse ruling by the "state court, may take a transcript of the proceedings "and papers to the Federal court, whereupon that court "for itself must determine whether a removal has been "affected. (Citing cases.) The cases are not in con- "flict; and, if there should be conflict between the "courts, as there was in this instance, *each court assert- "ing jurisdiction*, it results that *the parties must in* "EACH *court take the steps necessary for the protection or "vindication of their rights.* The proposition that the "decision of the state court refusing the pe- "tition for removal is conclusive upon the "parties in another court proceeds upon the "mistaken assumption that the decision is in its "nature final. It is not final in the court that makes "it" (it has since, however, become final, and is here "sought to be reversed) "and by no rule or principle of "*res adjudicata* can it be final in any other court, what- "ever weight it may be entitled to as authority or upon "considerations of comity."

And the court in stating that it was not necessary to pass upon the dissolution of the injunction which was the subject of the appeal added:

"If, on the other hand, jurisdiction was not acquired" (by the Federal Court, because the case was not re- movable) "the order of dissolution was a nullity, "without effect in the Superior Court, WHERE THE SUIT "REMAINS, and there is no necessity that it be re- "viewed."

An instance of the application of the correct rule as to the power of the state court to retain jurisdiction, in spite of the attempted removal of a case to a Federal court and the assertion by that court of jurisdiction, is

found in *Drake* v. *Kaiser*, 73 Iowa, 703. In that case the Supreme Court of Iowa sustained the state trial court in its refusal to grant a removal, and in its retention of jurisdiction and rendition of judgment, although the case was docketed in the Federal court, and jurisdiction assumed by the Federal court. The case in the Federal court is shown in the report of *Wagner* v. *Drake*, 31 Fed. Rep., 849.

In *White* v. *Holt*, *Judge*, 20 W. Va., 792 (111 U. S., 134), the facts were as follows:

One White brought an action in the Circuit Court of West Virginia, held by Judge Holt, against the Chesapeake and Ohio Railroad Company. The defendant presented a petition and bond for removal, which was denied by Judge Holt. Thereupon the defendant obtained a transcript of the record and filed the same in the Federal Circuit Court. That court took jurisdiction of the case and ordered it docketed, etc. (20 W. Va., 796.)

Upon this being made known to Judge Holt, he fell into the error indulged in by the Supreme Court of Wisconsin in a certain case, and held that he had no further power to consider the case. Thereupon the plaintiff applied to the Supreme Court of Appeals of West Virginia for a writ of mandamus, directing Judge Holt to proceed with the trial. The Chesapeake and Ohio Railroad Company, the defendant, was made a party to the petition, and, upon the mandamus being awarded, took that case to this Court, where the writ of error to the West Virginia court was dismissed. (*Chesapeake and Ohio Railway* v. *White*, 122 U. S., 625.) The Federal Circuit Court not only took jurisdiction, but finally dismissed the case for want of prosecution.

The Supreme Court of West Virginia discusses the

question so exhaustively that we quote at length (20 W. Va. Rep., at p. 800):

"The first inquiry that should be made is, was the "action of *A. E. White, Adm'r.* v. *The Chesapeake* & "*Ohio Ry. Company removable* under the acts of Con- "gress?"

After reciting the record as to this point, and determining for itself that the case was not in fact removable, the court proceeds:

"We can see no middle grounds; either the state "court has the right to decide judicially, whether "or not the requirements of the acts of Congress relative "to the removal of causes into the Federal court have "been complied with, or else the state court has no rights "whatever in the premises, and the mere filing by the "party in the Federal court of the petition and bond at "any stage of the proceedings in the state court, *ipso* "*facto*, removes the cause into the Federal court, and "upon a motion to remand the latter court alone has "the right to decide whether or not the petition was "filed in time, whether or not the bond and security were "sufficient and whether or not the facts as they appear "by the record entitle the party to have his cause re- "moved. I know a number of courts have so decided, "but among them there is no decision of the Supreme "Court of the United States. (Citing several state and "*nisi prius* Federal decisions.) On the other hand it "has been held by many courts that it is the duty of the "state court, to whom the application for removal is "made, to inquire into the facts and judicially pass upon "the question whether or no, under the act of Congress, "the case is removable, and either to grant or to deny the "prayer of the petition. (Citing twenty-three different state court cases.)

The court then reviews some of these cases and proceeds (page 806 of report):

"We have reviewed these authorities with the purpose "of showing what construction the courts of last resort "of a large number of the states have put upon the re-

" moval acts of Congress, with regard to the right of the " State court to investigate and *judicially* pass upon the " facts necessary to entitle a party to a removal of a " cause, before it is compelled to relinquish its jurisdic- " tion. But in full accord with these state authorities " are decisions of the Supreme Court of the United " States."

The court then proceeds to review *Gordon* v. *Longest*, 16 Pet., 97; *Kanouse* v. *Martin*, 15 How., 198; *Fashnacht* v. *Frank*, 23 Wall., 416; *Kimball* v. *Evans*, 93 U. S., 320; *Railway Company* v. *Ramsey*, 22 Wall., 328; *Bible Society* v. *Grove*, 101 U. S., 611; *Insurance Co.* v. *Pechner*, 95 U. S., 183; *Armory* v. *Armory*, 95 U. S., 196; *The Removal Cases*, 100 U. S., 474, and *Railroad Co* v. *Koontz*, 104 U. S., 5, and proceeds:

" The Circuit Court of Greenbrier not only had the " right to decide the question, whether the action was re- " movable, but as we have found decided it correctly. " The filing of the transcript and the docketing of the case " in the Federal Court after the filing of the petition and " bond, of course, did not and could not remove the " case." (*Merchants National Bank* v. *Brown*, 17 Fed., 161.) " When the State Circuit Court refused the peti- " tion of the defendant, the proper course for it to have " pursued, instead of defying the state court, was to " submit to the refusal of the court, proceed with the " trial, and in case of an adverse judgment take an appeal " to this court, and if the judgment of the court below " had been affirmed, obtain a writ of error from the " Supreme Court of the United States, which alone can " finally decide the question. *There is neither reason nor* " *authority for the proposition, that an inferior Federal* " *court can sit in review of the judgment of even an in-* " *ferior state court.*"

The court then points out the confusion and conflict arising from any other course, and adds:

" It having been many times held by the Supreme " Court of the United States, that before the state court

" is compelled to give up its jurisdiction it must be judi-
" cially informed that its power over the case has been
" taken away, then that judgment like any other ought
" to stand until it is reversed by appellate proceedings,
" and when so reversed all orders entered after a proper
" application for removal has been made, and a case for
" removal is shown to exist, shall be declared null and
" void by such appellate court. *Hadley* v. *Dunlap*, 10
" Oh. St., 1. But it has been uniformly held by the
" Supreme Court of the United States that the jurisdic-
" tion of the state court is in no case taken away unless
" the case at the time of the application was removable:
" and that the state court must pass upon that question.
" In this case the state court did pass upon that question
" and denied the prayer of the petition; and we have
" found that the case was not removable. Therefore,
" the jurisdiction of the state court was not ousted, and
" the docketing of the action in the Federal court could
" not remove a non-removable case.

The court then refers to *Dietzsch* v. *Huidekoper*, 103 U. S., 494, and distinguishes it on the sound ground that the case removed therein was removable.

If this case is not removable, the Federal Circuit Court never had any jurisdiction to order it docketed or to pass on the motion to remand. Its action was *coram non judice*. Plaintiff in error, however, has strenuously contended that by reason of the docketing of the case in the United States Circuit Court, and the refusal of that court to remand, this case in all of its subsequent proceedings through the Superior, Appellate and Supreme Courts, has been only a phantom.

That *White* v. *Holt*, 20 W. Va., 792 (same case in its different phases in this Court, 111 U. S., 134; 122 U. S., 625), *supra*, was correctly decided is evident from the following cases, which sustain its reasoning:

Beadleston v. *Harpending*, 32 Fed. Rep., 644.

Springer v. *Howes*, 69 Fed. Rep., 849.
Connell v. *Utica I. E. R. & R. Co.*, 13 Fed. Rep., 241.
Gregory v. *Hartley*, 113 U. S., 742, 745.
Burlington Ry. Co. v. *Dunn*, 122 U. S., 513.
Crehore v. *Ohio etc. Ry. Co.*, 131 U. S., 240, 244.
Missouri Pac. Ry. Co. v. *Fitzgerald*, 160 U. S., 556.
Broadway Nat. Bank v. *Adams*, 130 Mass. 431.

In the following cases this Court has affirmed the judgments of state courts in cases where there was an unsuccessful attempt at removal of the case to the Federal court. If the attempt at removal deprived the state court of jurisdiction as plaintiff in error has contended, then such cases have been wrongfully decided.

Ins. Co. v. *Pechner*, 95 U. S., 183, 185.
Gregory v. *Hartley*, 113 U. S., 742, 745.
Manning v. *Amy*, 140 U. S., 137.
Oregon Short Line Ry. v. *Skottowe*, 162 U. S., 490.
Merchants' Cotton Press Co v. *N. A Ins. Co.*, 151 U. S., 368.
Tripp v. *Santa Rosa St. R. R. Co.*, 144 U. S., 126.
Fashnacht v. *Frank*, 23 Wall., 416.

In addition to these, *Florence Sewing Machine Co.* v. *Grover & Baker Co.*, 110 Mass., 70, should be noted. In that case removal was denied in the state court, and a transcript filed in the United States Circuit Court, *where*

a motion to remand was denied. (1 Holmes' C. C. Rep., 235, Fed. Case No. 4,883, and note thereto.) The cause proceeded to final judgment in the state court, which was affirmed by this Court. *Sewing Machine Company Cases*, 18 Wall., 553.

Similar judgments in state courts were affirmed in *Vannevar* v. *Bryant*, 21 Wall., 41 (affirming the judgment in *Bryant* v. *Rich*, 106 Mass., 180), and in *Railroad Company* v. *McKinley*, 99 U. S., 147.

In *Young* v. *Parker's Administrator*, 132 U. S., 267, this Court says, in a case where the removal was improperly granted, "that therefore the jurisdiction of the state court was never divested."

In *Merchants' Nat. Bank* v. *Brown*, 17 Fed. Rep., 161, the court says:

"As the jurisdiction of the state court has never been "lawfully divested, it follows that this court has never "acquired jurisdiction. The case has never been removed "from the state court to this court. It cannot, there- "fore, be remanded, but all proceedings in this court should "be dismissed, and such an order will be entered, with "costs."

In *Edwards Mfg. Co.* v. *Sprague*, 76 Me., 53, the Supreme Court of Maine quotes with approval the following from *Stone* v. *Sargent*, 129 Mass., 507:

"It is the duty of the state court, before relinquishing "jurisdiction of a cause once lawfully brought before it, "and discharging that cause from its own docket, to be "satisfied that there has been a compliance with those "conditions. If the highest court in the state errs in "holding that the petitioner is not entitled to remove the "cause, its judgment may be revised and reversed on "writ of error by the Supreme Court of the United "States, and all proceedings had in the courts of the state "after due application for a removal may be ordered by "that court to be set aside. But no act of Congress and

"no adjudication of the Supreme Court of the United "States has made the opinion of the state court upon the "question, whether its own jurisdiction must be sur- "rendered, *subordinate to the opinion of any Federal "tribunal below the Supreme Court.*"

As further showing that the state court has powers at least equal to those of the *nisi prius* Federal courts to pass upon removability as a question of law, the cases are to be noted which consider what the effect is on the judgment of a state court, if it errs in passing upon the removability of a case.

This question is passed upon in *Johnson* v. *Brewers Fire Ins. Co.*, 51 Wis., 570. The Supreme Court of Wisconsin there says:

"This is an appeal from the judgment of the County "Court of Milwaukee County in favor of the plaintiff "and against the defendant. The action in the County "Court was founded upon a judgment recovered in the "Circuit Court for Menominee County, in the State of "Michigan, in favor of one Boswell, against the defend- "ant, which judgment had been assigned to the plaintiff "below before suit was brought. The defendant an- "swered in this action *nul tiel* record. Upon the trial "the plaintiff introduced an exemplified copy of the suit "in the Michigan court, showing the rendition of the "judgment sued upon, and also proved an assignment of "the same to the plaintiff. It appeared by the judg- "ment roll in evidence that a verified petition and "bond for removal of the cause to the United "States Circuit Court were filed in the state "court on the 24th of August, 1874, and a "motion by the defendant for a removal was made, "which was denied on the 11th of September following. "Thereupon the defendant made a motion for the con- "tinuance of the cause, which motion was granted. It "appears that a second petition and bond of removal "to the United States court were filed on the 3rd day of "May, 1875. A motion for a removal was again made, "which was denied on the 5th of that month."

(The statement of the case also shows that *the petition and bond were in fact sufficient*, and that on the denial of removal the defendant, on May 28, 1875, filed a transcript in the United States Circuit Court; that the plaintiff entered his appearance in that court and *moved the court to remand the case, and that such motion was denied.* Report of case, pp. 571, 572.)

"Thereafter the case was called for trial, damages as-
"sessed by a jury in the absence of the defendant, and
"the judgment ($3,015.74) sued upon was rendered.
"These are the material facts upon which the real ques-
"tion of law arises upon this appeal. That question is:
"do these matters set forth in the record of the state
"court of Michigan show that the judgment of that court
"was *not merely voidable for error, but absolutely void?*
"It is apparent that that is the only question
"which is open for our consideration—whether, indeed,
"the Michigan court lost all jurisdiction to proceed
"in the cause, after the application was made, under the
"provisions of the act of Congress for its removal into
"the Circuit Court of the United States. Mere error
"in the proceedings of the state (Michigan) court cannot
"be corrected in this court, or reviewed here, for the
"obvious reason that we have no revisory power over
"that court. But it is claimed by the learned counsel
"for the defendant, that, as soon as application was
"made to the state court, in conformity to the acts of
"Congress, for a removal of the cause *eo instanti* the
"state court lost all jurisdiction over it, and every sub-
"sequent step therein was *coram non judice*, and the
"judgment rendered was null and void. In this case
"counsel insists that the application for the removal
"was sufficient in form and reasonable in time, and
"ousted the jurisdiction of the state court, and that in
"this *collateral* action we should hold that the record
"shows an entire want of jurisdiction to render the
"judgment sued upon. A majority of the court is not
"prepared to adopt this view of the law. In dis-
"senting from it we hold that when the case is
"within the act of Congress and an application in

"proper form for its removal is made, it is "the duty of the state court to accept the petition and "bond and proceed no further in the suit. This is the "mandate of the statute. But if the state court declines "to relinquish its jurisdiction, and proceeds to judgment, "such judgment *is not void but erroneous merely.* Un- "til it is reversed or set aside in a proper manner by an "appellate court, it is valid and must be respected; "certainly in a collateral action upon it.

"The defendant had an ample remedy to correct the "decision of the state court refusing to remove the cause "and proceeding to judgment. * * * We are not "aware that the precise question we are considering has "ever been passed upon by the Supreme Court of the "United States. There are doubtless some dicta and "many expressions to be found in the decisions of the "Federal courts, to the effect that, if the case is re- "movable and the proper application is made therefor, "the jurisdiction of the state court is ousted, and all sub- "sequent proceedings in the cause in that court are "*coram non judice.*

"But it is doubtful if this language, in the connection "in which it is generally used, really means anything "more than that *such subsequent proceedings were er-* "*roneous.*"

The court then proceeds to review the authorities and concludes:

"*We have assumed that the state court erred in not re-* "*moving the cause on the application made. But we* "*hold that its subsequent judgment was not rendered void* "*for that reason.* If the state court erred in its decision "upon that point, this court, in an action upon its judg "ment, has no power to correct that error."

In *S. P. R. R. Co.* v. *Superior Court*, 63 Cal., 607, there was an application for a writ of prohibition to a state court which had denied a petition for removal, and was proceeding to the trial of the case. The Supreme Court of California denied the writ, saying, page 613 of the report:

"But it seems to us quite clear that if we can look into "the petition for removal for the purpose of determining "whether a case within Federal cognizance is presented, "the Superior Court in which the case is pending may do "so, and if it can, its determination of the question whether "right or wrong, *would neither be without nor in excess* "*of its jurisdiction.*"

In *Chesapeake and Ohio R. R. Co.* v. *White*, 111 U. S., 134, 137, there was an application for a writ of prohibition to prevent Judge Holt from proceeding in accordance with the opinion in *White* v. *Holt*, 20 W. Va., 792, quoted *supra*. This Court says:

"If a sufficient case for removal was made in the "Circuit Court the rightful jurisdiction of that court is "gone, and it cannot properly proceed further; but if it "does proceed and does force the defendant, who applied "for the removal, to a trial, *the remedy is by a writ of* "*error after final judgment*, and not by prohibition or "punishment for contempt."

It would seem therefore, that the judgment of a state court which has wrongfully denied a petition for removal is merely erroneous and not void and not open to attack collaterally. The decision of Judge Grosscup refusing to remand was *collateral* and not upon review.

In the Federal courts such a state court judgment is entitled to at least the same force and effect as it would be given in another state.

Pennoyer v. *Neff*, 95 U. S., 714.
Kansas City, Ft. S. & M. R. Co. v. *Morgan*, 76 Fed. Rep., 429.

It has already been shown that there has been no distinction made in this Court in favor of the decision of the Federal Circuit Courts upon the question of the removability of a case. f any distinction is to be made it should be made in favor of the state courts, whose juris-

diction is general, rather than in favor of the Federal courts, whose jurisdiction is limited. The removability of a case is a question arising incidentally in the state courts. In the Federal courts it is a condition precedent to any jurisdiction whatever.

This Court has recently held that where a Federal court errs in its decision as to the removability of a case, its judgment is *merely erroneous and is not void.*

In *Dowell* v. *Applegate*, 152 U. S., 327, a case arose in the state courts in Oregon. The issues involved questions determined in a former action begun in a State Circuit Court and removed into a Federal Circuit Court upon grounds alleged to have been insufficient. The state court in the second case ignored the prior adjudication in the Federal Circuit Court on the ground that the removal was improper and that the Federal Circuit Court was without jurisdiction. This Court says, page 337 of the report:

"If the Federal court erred in assuming or retaining "jurisdiction of Dowell's suit—a question not necessary "to be examined—would it follow that its final decree "being unmodified and unreversed, can be treated as a "nullity *when assailed collaterally* by one who was a "party to the suit in which it was rendered?"

This Court then reviews numerous cases, and proceeds:

"These cases establish the doctrine that, although the "presumption in every stage of a cause in a Circuit "Court of the United States is that the court is without "jurisdiction unless the contrary affirmatively appears "from the record (*Bors* v. *Preston*, 111 U. S., 252, and "the authorities there cited); yet if such jurisdiction "does not so appear, *the judgment or final decree cannot "for that reason be collaterally attacked or treated as a "nullity.*

"These authorities above cited, it is said, do not meet "the present case, because the ground on which it is

" claimed the Federal court assumed jurisdiction was in-
" sufficient in law to make this case one arising under the
" laws of the United States. But that was a question
" which the Circuit Court of the United States was com-
" petent to determine in the first instance. Its deter-
" mination of it was the exercise of jurisdiction.
" Even if that court erred in entertaining jurisdiction,
" its determination of that matter was conclu-
" sive upon the parties before it, and could not
" be questioned by them, or either of them, *col-*
" *laterally or otherwise than on a writ of error or appeal*
" *to this court.* As said in *Des Moines Nav. Co.* v. *Iowa*
" *Homestead Co.*, above cited, if the Circuit Court 'kept
" the case when it ought to have been remanded, or if it
" proceeded to adjudicate upon matters in dispute between
" two citizens of Iowa, when it ought to have confined
" itself to those between the citizens of Iowa and the citi-
" zens of New York, its final decree in the suit could
" have been reversed, on appeal as *erroneous*, but the
" decree would *not have been a nullity.* To determine
" whether the suit was removable in whole or in part or
" not was certainly within the power of the Circuit Court.
" The decision of that question was the exercise and the
" rightful exercise of jurisdiction, no matter whether in
" favor of or against taking the cause.' "

The right of one party to remain in the state courts is as great as the right of the other to take the case into the Federal courts. It is certainly as serious a fault for the Federal courts to take a case from the state courts which is not removable, as for the state courts to retain a case which is removable. There is no possible ground of distinction upon which it can be held, that a judgment of a state court, where it has erred upon the question of removal, *is void*, while the judgment of a Federal court under like circumstances *is only erroneous*, nor is there any reason for holding that the decision of a Federal court refusing to remand is of any more force than the decision of a state court refusing to grant a removal.

This defendant in error submits that there is no ground discoverable upon which it can be reasonably asserted that this case was removable. Such being the status of the litigation, any further delay will tend to seriously embarrass the trust estate, and the duty of this defendant in error to its trust therefore leads it to join in the motion to dismiss the writ of error, or for an affirmance. Since the Supreme Court of the state has by its construction of a state statute conclusively established the fact of the incompetency of plaintiff in error as trustee, this defendant is in the embarrassing position of a trustee, which is required by the trust instrument to appoint a new trustee but which finds a cloud thrown upon the exercise of such power of appointment by reason of the *supersedeas* issued by this Court, which stays the finality of the decree directing this defendant in error to exercise such power.

It is respectfully prayed that the motion to dismiss the writ of error be granted, or that the judgment of the Supreme Court of Illinois be affirmed.

T. A. Moran,
Levy Mayer,
Solicitors for the American Trust and Savings Bank, Defendant in Error.